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Association Will Meet at San Francisco

THE Annual Meeting of the American Bar Association this year will be held at San Francisco. This decision was reached at the meeting of the Executive Committee at Tampa, Fla., Jan. 9, 10, and 11. Invitations were also presented at that meeting in behalf of Los Angeles, Minneapolis, Atlantic City, Spring Lake, N. J., Denver, West Baden, Ind., Asbury Park, N. J., Cleveland, Chicago, Louisville and New York City. Their claims were carefully considered but the Committee decided that the West was entitled to the recognition which the bench and bar of seventeen states were practically unanimous in requesting. It will be held in the week beginning August 6, the exact date to be set by the committee in charge of the program. The President, Secretary and Treasurer were constituted a program committee.

Other important business was transacted. President Severance reported encouraging results from his efforts to assist in the passage of the bill in Congress to increase the number of Federal judges, also the present status of legislation on the subject. On motion of Mr. Corliss the Committee endorsed Senate Bill 2433 and requested Judge McClellan to prepare a resolution, to be presented personally by President Severance, unless after conference with the Attorney General some modification of the measure is found desirable.

The Committee also passed a resolution, on motion by Judge McClellan, requesting the President to appoint a committee consisting of three members of the bench and two members of the bar, outside of the Executive Committee, to take up and consider the proposal to formulate a code of judicial ethics, and to report to the Executive Committee thereon, with discretion to present such a code of ethics as they desire to recommend. A report from Senator Selden P. Spencer, chairman of the Committee on Marking the Grave of Chief Justice Chase, was presented by Mr. Wadhams. The Executive Committee was of the opinion that the design accompanying it was not sufficiently in keeping with the character and eminence of the subject. In this connection it passed a resolution expressing the sense of the Executive Committee that contributions be solicited from the Ohio State Bar Association and such other organizations in Ohio, and from individuals as the President of the American Bar Association may deem proper, and suggesting a suitable marking for the monument.

Various movements tending to undermine respect for law and the courts were set forth by President Severance, who suggested that a counter-propaganda be organized under the direction of the Association through a special committee. Major Edgar B. Tolman, editor-in-chief of the Journal, suggested at this point a method by which that organ might effectively cooperate in such a plan. Thereupon a resolution was adopted that a committee of five be appointed to carry out the proposed suggestions.

Mr. Shelton presented a resolution of the Committee on Uniform Judicial Procedure reciting that the American Bar Association had for nine years in succession unanimously endorsed a certain bill having for its purpose the modernization and uniformity of the procedure and practice in the Federal courts; that the bill had been withheld in committee instead of being reported, although a majority of the members of the Judiciary Committee and a large majority of Senators and Representatives had expressed themselves as favorable to the measure; and requesting the Judiciary Committee of the Senate to make a report upon the said

Senate Bill No. 2870 introduced by Hon. Frank B. Kellogg at the request of the American Bar Association.

A resolution was adopted on motion of Mr. Shelton to the effect that the Association was in hearty sympathy with the efforts being made to establish in educational institutions schools to train students in the knowledge of our system of government as developed from its historical antecedents, and particularly commending the proposal to establish at the ancient College of William and Mary in Virginia the Marshall-Wythe School of Government and Citizenship, in view of the inspiration which the historical associations of that locality will instill into our youths.

An invitation from Dr. Masujima to the American Bar Association to join the association termed the "International Bar Association" with headquarters at Tokio, was received. On motion of Mr. Blackburn a resolution was passed that, inasmuch as such an invitation involved a radical departure, the Executive Committee felt that it should be presented to and acted upon by the Association itself; that the Association should notify Dr. Masujima, president of the International Bar Association of this, and that further action on the matter should be deferred until a later meeting of the Executive Committee.

The report of the special committee, defining the scope of the Standing Committee on Professional Ethics and Grievances of the American Bar Association, was submitted and, after some discussion, approved. It recommended a broadening of the powers of the standing committee and proposed an amendment to the By-Laws to accomplish it. The Secretary reported the death, on Jan. 6, of Edgar H. Farrar of New Orleans, an ex-President of the Association, and Mr. Hart was requested to prepare a suitable message of sympathy to the family of the deceased member in the name of the Executive Committee.

The invitation extended by President Severance on December 31 to the Right Honorable Lord Shaw, of Dumferline, to attend the next meeting of the American Bar Association as its guest and to make an address, was unanimously approved by the Committee. Lord Shaw will be the guest of the Canadian Bar Association which meets at Vancouver after the meeting of the American Bar Association. On motion of the President, Sir John Simon of London, England, who addressed the Association at the Cincinnati meeting, was elected an honorary member.

President Severance announced the appointment of a special committee, composed of Messrs. Brosmith and Shelton, to act on the proposals made by Mr. James D. Andrews of New York, chairman of the Committee on Classification and Restatement of the Law, relating to a plan of cooperation between the American Academy of Jurisprudence and the American Bar Association Committee on Classification and Restatement of the Law. The President also reported the appointment of a special committee to be known as the Journal Advertising Committee, and his action was approved.

The report of a subcommittee headed by Mr. H. H. Brown relative to membership in the American Bar Association for native members of the Filipino bar, suggesting that such membership should be open to those who meet the standards of membership recognized in the American Bar Association and, further, suggesting that such applications be handled in the same manner as in the several states, through the approval of the Local Council, was adopted.

On motion of Mr. Brown the following officers for the separate jurisdiction of the Philippine Islands were recognized: General Council, Eugene A. Perkins; Vice-President, William A. Kincaid; Local Council—James G. Lawrence, Robert E. Manley, Patrick J. Moore, Francisco A. Delgado. On motion of Mr. Hart the Committee expressed its sense that the members of the American Bar Association resident in China be requested to hold a meeting and elect General Council, Vice-President and Local Council under the name of the American Bar Association in China.

Mr. Herbert L. Faulkner of Juneau, Alaska, was elected a member of the Alaska Local Council in place of James Smiser, deceased. Mr. John Knauf of James, N. D., was elected a member of the Local Council of that state in place of John E. Greene deceased. On motion of Mr. Shelton a list of one hundred thirty-five applicants for membership, duly certified by local councils, was elected.

The committee appointed to consider the subject of appropriations made the following recommendations which were adopted: Admiralty, $100; Publicity, $500; Professional Ethics, $100; Internal Revenue, $350; Commerce, Trade, etc., $1,000; Law Enforcement, $500; Section of Bar Association Delegates, $1,000; Special Representatives, $1,000; Section of Legal Education, $1,250; Commissioners on Uniform State Laws, $1,500; Committee on Chase Monument, $500.

The appreciation of the Committee of the generous hospitality extended to them by the Bar Association of Hillsborough County, the lawyers of Tampa, the press of Tampa and the hotel management was expressed in a resolution offered by Mr. Hart and unanimously adopted. The program for their entertainment embraced tours to points of interest, a Spanish dinner, a banquet at the Tampa Bay Hotel and other interesting features. At the opening session Hon. S. M. Sparkman delivered the address of welcome instead of Hon. Jefferson B. Brown, Chief Justice of the Supreme Court of Florida, who found it impossible to be present.

SIGNED ARTICLES

As one object of the AMERICAN BAR ASSOCIATION JOURNAL is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

THE CHANGING FOUNDATIONS OF GOVERNMENT

Startling Movements Are Taking Place Deep Down in American Political and Economic Life and It Is of High Importance That They Be Rightly Understood*

By Nicholas Murray Butler

President of Columbia University

HE is indeed a brave and a confident man who would express satisfaction with the present states of the world's affairs or who would profess fully to understand them. The magnitude of human relationships and their effects have been enormously increased during the past half century. In times gone by when there were great military disasters, or dynastic changes, or racial migrations, or economic upheavals, the number of individuals and the geographical area directly affected, however important, were nevertheless relatively few and relatively small. As the world is now constituted, whenever any such happening occurs the parties in interest are numbered by hundreds of millions, and the whole round world is involved.

When one looks out over the troubled surface of the world of today, it would appear that man's control over the forces and resources of nature has outrun, at least for the time being, his capacity to adjust himself to these new conditions and to bear with effective responsibility the new and heavy political and economic burdens that the changes of the past century have placed upon his shoulders. Looked at in another way, it would seem as if the directing forces of the 20th century have lost that firm hold upon controlling principle and that faith in definite political ideals which have characterized pretty much all the makers of modern civilization, and which in particular marked the builders, the expounders and the defenders of the Government of the United States. Today it is not easy to fix the character of a public policy or the place of a public man by the label that is borne by that policy or by that individual; for the label may be used solely for personal advantage or for temporary gain, or in apparent ignorance of its true meaning and without any reference whatsoever to its historic and well-tested significance. In Europe there are Conservative men and measures that would be indignantly repudiated by those who gave meaning and content to the word Conservative. Likewise, there are so-called Liberal men and measures with which the founders and teachers of modern Liberalism could have nothing in common. In the United States there are Democrats and Democrat policies that flatly contradict every teaching of Thomas Jefferson, and there are Republicans and Republican policies that only a short generation ago would have been vigorously outlawed by that powerful political organization, and that would have filled John Marshall, Alexander Hamilton, Daniel Webster and Abraham Lincoln with chagrin and dismay. It would be more honest and more sincere to give new doctrines new names, and not to attempt to transform or to appropriate old and well established ones.

Nor have the important changes been only those that are on the surface. Deeper down, at the very foundations of our political and economic life, changes are taking place that are more startling still. The foundations of American government and of American life are being moved, and it is of high importance that we should understand what is moving them and whither they are moving. Only then shall we be able to determine whether the movement is for good or for ill.

It is certain that we have found a way to reduce to a minimum the guarantees of civil liberty without which the Constitution of the United States coud not have been adopted. By the use of that very elastic term "police power" and by its steadily broadening interpretation and application by the courts, we have enormously increased the scope of government, greatly restricted the field of civil liberty and worn away no small part of the distinction between a government that rests upon a written constitution and a government that rests directly upon the will of the electorate or upon the immediate authority of a representative legislative body. The student of history and of government cannot help asking whether all this does not mark reaction rather than progress. He has watched the discovery and slow strengthening for centuries of great principles growing out of human association. He has seen these principles tested and purified in momentous struggles between men, between nations and between races. He has then seen them written into the public acts of organized society, and he feels, and justly feels, that out of the centuries of struggle and experience these principles have come as a product of permanent helpfulness and value. He is prepared for new applications and new interpretations of these principles to meet changing conditions, but he is not prepared to see them flouted and overthrown and treated as mere historical curiosities rather than living principles of morals, of economics and of political association.

Yet this is exactly what is happening before his eyes. The precepts of liberty and the dictates of justice, as these have been through the long history of human progress, are treated lightly and unconcernedly when they appear to stand in the way of some immediate interest, some individual ambition or some group privilege. Yet it was precisely to these ends that those principles and those dictates were brought into existence at such stupendous cost of human experience.

It is the elder D'Israeli who is responsible for the bitter saying that "politics is the art of governing men by deceiving them." One may wonder whether perhaps this cynical definition does not apply to much of the politics by which we are surrounded both at home and abroad, and whether the deceit does not consist chiefly in concealing from men the

*Address delivered at annual banquet of Illinois Bar Association at Chicago, Dec. 10, 1921.

stupendous sacrifice which they are called upon to make whenever a lasting and protecting principle is overridden in order to gain a special or an immediate interest. There is a fine sentence in one of Lord Stowell's classic opinions that should be kept ringing in the ears of our modern democracies and their leaders of opinion, their legislatures and their courts: "To press forward to a great principle," said Lord Stowell, "by breaking through every other principle that stands in the way of its establishment . . . . is as little consonant to private morality as to public justice." If Lord Stowell had been addressing the Congress of the United States or some of the State Legislatures of this twentieth century he might have used precisely those words with complete propriety. It is through lack of knowledge of the history and meaning of the underlying principles of government and through lack of foresight as to what will happen if those principles are put aside or overthrown, that men and political parties and legislatures and courts march so jauntily toward the achievement of some immediate purpose which affects the interests or stirs the emotions of men. If democracies show themselves unable to think, and constantly yield to the promptings of passion or the invitation of interests, they cannot hope to endure. Man thinking, society thinking, government thinking, can alone hope to win and to hold a lasting place.

It is odd how easily men of undoubted power and sincerity can deceive themselves. This has been done from time immemorial by philosophers, by men of letters and by leaders of the people. Just now Liberal and Liberalism are words to conjure with. One would suppose that their meaning had been pretty accurately fixed by their use in both ancient and modern times, and particularly since the overthrow of the Stuart monarchy in England. Yet there are those who would so use and so interpret these noble terms as to make them include their exact opposite. A recent writer on political theory first describes the origin and elements of Liberalism and then follows with a chapter entitled "The State and the Individual." The reader enters upon that chapter in the atmosphere and spirit of Liberalism. He emerges from it in the atmosphere and spirit of Socialism, which is Liberalism's exact antithesis. He is warned shortly that there are some kinds of Socialism with which Liberalism has nothing to do, but it is pretty plainly inferred that there are some kinds of Socialism that Liberalism can accept. Somewhere and somehow in that chapter the magician has drawn the egg from his sleeve, but the reader does not see how or when it is done; Liberalism has been transmuted into Socialism. This illustration is worth citing because it typifies just what goes on in so many minds in America and elsewhere. An individual leader of opinion, a legislative committee, or a court of justice enters upon the consideration and discussion of some significant issue in one spirit and under one atmosphere, and little by little, through stages that are hardly perceptible and in ways that are difficult to fasten upon, the individual, the legislative committee or the court of justice concludes that consideration and discussion in a totally different spirit and in a totally different atmosphere. No man and no influence have been consciously changing the foundations of our Government. Every attempt consciously to change those foundations, whether through persuasion or by force, has failed. The changes that have taken place and that are taking place have been unconsciously made, and many of them are still unrecognized and not understood. The historian of the United States who looks beneath the surface of things will have much that is interesting to say about the happenings of the generation in which we live. He will compare and contrast what is said and done among us with the precepts of Jefferson and the teachings of Hamilton, with the political philosophy of Marshall and the convincing rhetoric of Webster and with the rugged commonsense of Abraham Lincoln, and will wonder to what purpose and in the hope of what gain we have drifted so far. It is well worth while to make search, however brief, for an explanation.

Perhaps an explanation, if found, will be manifold rather than single and complex rather than simple. It will probably have to take account of the clash in men's minds between the results of liberty and the desire for equality; of the steadily growing incapacity of representative government and the steadily increasing lack of confidence in it; of the unwillingness to subordinate an immediate advantage to a future gain; of the dissatisfaction with any principle or rule of conduct, however noble or however hoary with age and honorable with service, that stands in the way of individual or group interest; and finally of the breakdown of the doctrine of a common citizenship in a democratic Republic before the increasingly sharp division of citizens into classes or groups, with accompanying class or group interest, class or group ambition and class or group power.

The clash between liberty and equality is as old as human society itself. The only possible way of escape from this clash appears to be to cultivate that fraternity or sense of brotherhood which is indicated in the third and last term of the famous formula of the French Revolution. Liberty leads to an inequality and compels it. Equality makes liberty, and therefore progress, impossible. Liberty is the principle of life. Equality is a characteristic of death. There are no justifiable restraints upon liberty save those which grow out of the equal right of every other human being to liberty and to protection and security in the enjoyment of liberty. Some few forms of that inequality which follows upon liberty are generally accepted without resentment; but other forms are bitterly contested and quickly give rise to feelings of envy, hatred and malice. Our modern democracies have not yet progressed to a point where they are ready to defer to knowledge or capacity, if that knowledge or capacity exerts an influence which has any relation to their immediate political or social interests. These democracies are perfectly willing to acclaim excellence in the dead, but they greatly dislike yielding to its leadership in the living.

This attitude is still more clearly and more constantly in evidence in all that relates to property. It is quite forgotten that property has an ethical basis, and is nothing more or less than that which the individual has produced or acquired by his own capacity and thrift. So far from understanding that all individual property is the result of thrift, there are in increasing number those who cry out ecstatically with Proudhon that all property is theft. Property is an attribute of personality, and indi-

vidual property is essential to liberty. It is the name given to that which belongs to an individual because by his own effort he has produced or acquired it. The differences between individuals which underlie liberty and which make all human progress possible, speedily bring it about that individuals of varying opportunity, varying capacity and varying temperament possess varying and widely different amounts of property. If these differences result from the fair and just use of opportunity and capacity, well and good; no public or general interest is at stake unless this property be acquired through injustice or by reason of privilege. Justly acquired property is, in a free state, freely exchanged, granted or bequeathed. A public interest is involved only when the amount or character of individual property is such as necessarily to carry with it a power over the lives of others which is inconsistent with that very liberty and equality of opportunity out of which the institution of property has itself arisen. This may be described as the antinomy of liberty, and it must be resolved from the standpoint of liberty and not from that of the destruction of liberty.

The whole scheme of political philosophy upon which the Government of the United States is built includes and implies the institution of individual property and its protection. This institution is one of our fundamental rights, and without it the word America would be meaningless. Those who in the past have preached, like those who now preach, the destruction of all individual property and the substitution of communal holdings have in mind the overthrow of all that we call civilization and the stopping of all that we call progress. Fortunately, from the time of Plato to our own day it has not been found practicable to put these teachings in effect upon a large scale. When, in the Russian Revolution, the opportunity came to bring the life and conduct of nearly two hundred millions of people under the domination of these dogmas, that people was speedily overtaken by political and economic death. There will be a resurrection of the dead in the case of Russia just so soon as these bonds of false and reactionary doctrine are broken, and not until then.

The decline in capacity of representative government and the decline of public confidence in it are matters of common observation and of constant discussion. It does not appear, however, that representative government has lost prestige because of any weakness in the principle upon which it is based, but rather because we are working it badly. The theory of representative government is that the public affairs of men are worthy of special attention and study and demand it, and that the common interest will be best served by choosing from the general citizenship of a community those who for a term will occupy executive or legislative office, and on behalf of their fellow citizens and with an eye single to their best interests, will deal with the various practical questions that present themselves. As Edmund Burke said so long ago in that famous letter to the electors of Bristol, a representative owes to his constituents not only his time and his devoted service, but his intelligence and his conscience. A representative tied hand and foot by pledges extorted by eager or self-interested electors, is no longer a representative but a messenger boy. Such an one has forsworn his ability to deal with problems of government in the public interest, and has put it out of his power to keep his oath of office as executive or as legislator. That a representative's views should be known, that the principles which he aims to serve and to apply should be understood before he is chosen, go without saying; but that he should be committed before consideration and discussion to specific measures and closely defined policies, is repugnant to the whole conception of representative government in the public interest.

When the intelligent citizenship of a nation sees representative government being degraded, it naturally withdraws some measure of its confidence. Moreover, the legislative department of the Government, including both in the Congress of the United States and in the several State Legislatures, has developed a mad passion for the making of statutes, and particularly for the multiplication of crimes and of regulations, that justifies any reflective American in raising the question as to how long this sort of thing can go on and the American form of government itself endure. We need quickly to strengthen the foundations of representative government and thereby rebuild public confidence in it. This can only be done by attracting to the political service of the State men and women of the highest type of intelligence and character, who have no personal or group ends to serve. Not often are many such willing to run the gauntlet of our present deplorable electoral methods. While professedly increasing the power of the people over their government, we have actually put it out of the power of the people to secure the best, or perhaps even good, government. By forcing into constitutions matters that have not to do with the framework or functions of government, and that should always be within the authority of the legislative power, the distinction between the fundamental law and statutes has been broken down and the public respect for constitutional provisions and limitations in so far weakened. This is perhaps one of the gravest and most deplorable of our departures from sound and traditional American policy.

Foresight is an individual characteristic and not the quality of a group or of a nation. If permanent and helpful ends are to be preferred to immediate and selfish gains, it can only come about if leaders of vision and capacity are trusted and followed. Just now we are impatient of all such. We glorify the man who, at the moment of speaking, is in touch with popular sentiment, and crucify the man who is just now where we all shall be glad to be a few years hence. Just as the happenings of yesterday are no longer news, so the probable happenings of tomorrow are not interesting because of the distance which lies between them and us. This is the journalistic temper pure and simple, and it is as potent and unremitting an enemy of reflection and of vision, and therefore of political satisfaction and progress, as can possbly be imagined.

The breakdown of faith in underlying principles of government and of conduct began some time back, but it has proceeded with increasing rapidity for at least a quarter century past. It would doubtless be going too far to assert that the passing of the study of the ancient classics from the training of the leaders and spokesmen of modern peoples

is responsible for this, but that happening must bear at least a share of the responsibility. When the leaders and the teachers of the people were instructed, however imperfectly, in the origins and history of human association and of human achievement, they had a background and a point of view which enabled them to pass judgment upon the happenings of today in terms of standards of excellence and of achievement that had been well established by human experience. So completely has this knowledge vanished and so widespread have been the influence and the results of that vanishing, that today a public speaker before a general audience in the United States may not cite even the Bible or Shakespeare with any assurance that his allusion will be understood, to say nothing of the great orations and dramas and poems and historic events of Greece and Rome. To call these dead is to cut ourselves off from all that is most alive in the spirit of man. So long as this knowledge was general among persons called educated it served as a binding and unifying force, both intellectual and moral. It has now been displaced, however, by unrelated and often unimportant patches of information, which have neither the power nor the purpose to give intellectual or moral unity. Popular teachers of philosophy, of literature and of ethics are now laying down as a principle that there are no principles, but that each individual, each group, each generation must follow its own instincts and respond to its own emotions, finding out from its own experience what is pleasurable and what painful, what is useful and what harmful. Such teaching reduces man with all his history to the level of an animal, with no past save such as is organized in his bodily reactions and his self-protecting and self-satisfying instincts. The American people were once substantially unanimous in their faith in certain fundamental principles of government and of life. More than once they did battle for those principles, but now their children are told that no such principles exist. Can we wonder that under such circumstances the foundations of government are changing?

The division of society into groups or classes is no new thing; it is thousands of years old. The aim of liberty and the ambition of democracy have been to get away from it. This very division, with slavery at the bottom of the social order, crippled the political institutions of Greece. This very division with its sharp separation between patricians and plebeians played a large part in the history of Rome and in the struggle under Roman law for a better and a fairer chance in life. This very division is the key to the understanding of the feudal system, with all its peculiarities of privilege and of concentrated power. For hundreds of years the path of progress has lain away from this division into groups and classes and toward the notion that a free man in a free state, built upon free labor, is the equal of every other man; is free to come and go as he may choose; has equal rights before the law and equal protection from the law; may choose or change his occupation or his dwelling-place at will, and be answerable only to his own conscience and his God for his private conduct and his private life; that indeed he is a citizen in the full sense of that word. Now we are told that all this must be changed; that this doctrine is a now discredited teaching of Rousseau, and that newer and later teachers have something else to tell us, something of greater value and more practical import. There must be, it seems, no notion of a unified state, built upon a citizenship of free political equals, but there must be a sort of federation of groups, or classes, each reserving to itself power through the withdrawal of its coöperation to cripple at will, or indeed to ruin, the entire social fabric. This fantastic notion appears to assume that free men are going to stand idly by and see civilization destroyed, not by the armies of militarist imperialism, but by the sinister and selfish mutilation of the body-politic through the destruction of some one or more of its essential services. Those who are so eagerly spreading this doctrine abroad in England, in France, in Italy and in the United States, do not seem to realize that it invites, yes, compels, a social war that would rival in destructiveness the great military contest so lately ended, and against any possible renewal of which civilized man is now arming himself by every device of coöperation and wise counsel. We have protected society and civilization from militarism. Shall we now permit it to fall before the onslaughts of class consciousness and class interests?

There are ominous signs all round about us. The American form of government is in danger whenever a group of men endeavor to operate it in the interest of a section or a class. So long as political parties divide on questions of political principle and political policy, they are not only helpful and constructive, but essential to the life of the State. The moment, however, that parties are based upon sectional interest or jealousy, upon class consciousness or upon the desire for a group advantage, that moment they are out of step with the spirit of America. A labor party or a farmers' party is as undemocratic and as un-American as a millionaires' party, or a ship-owners' party would be. The man who in public office yields, through ambition or through fear, to the solicitations or the threats of those who would put the interests of any part above the interests of the whole, is both unworthy and unable to serve the American people. There is need of plain speech on this subject. The American farmer, the American wage-worker, the American manufacturer, the American business man, whether large or small, is paying heavily today, five years afterwards, for the un-American and unpatriotic act that was forced by threat upon the statute book of the United States in the early days of September 1916, known as the Adamson Law. This law established a privileged class among us and thereby increased the cost of living for every man, woman and child under the American flag, including the very members of the privileged class itself. Similarly un-American and unpatriotic are the exemptions from taxation of particular groups or particularly numerous classes of citizens. If we are to remain true to the hard-won principle of no taxation without representation, then we must uphold its accompanying principle: Where there is representation there must be taxation in proportion to capacity to pay.

The use of the power of the state to enforce some particular rule of conduct, which those to whom it appeals describe as moral, may easily differ only in form and not in fact from the long since abandoned use of the power of the state to enforce conformity in religious belief and worship. Pri-

vate morals and private conduct are matters for the conscience of the individual and not for regulation by some majority which, at best, can only be temporary. Equally shocking to the true American is the giving of funds by individuals of wealth and by private associations to enforce some particular law or group of laws, which they thus single out from the great body of statutes. If the fortunate possessors of wealth are to be permitted to secure the exceptionally strenuous enforcement of those laws in which they themselves most strongly believe, they might almost as well be permitted to write the laws.

The sum and substance of the whole matter appears to be that the interpenetration of politics and economics, which Aristotle pointed out so long ago, has now proceeded to a point where the public interest is greatly in danger because of the fact that the future consequences of this interpenetration are not clearly understood. Ignorance of economic history and economic laws is particularly widespread among modern peoples. One wonders what the schools and colleges have been doing for the last half century that men and women who have passed through their doors are left in such ignorance of the facts and the laws that play so large a part in human life. Senators and Representatives in Congress vote with fierce joy to impose, in time of peace, very high taxes on wealth without in the least appearing to realize that by thus diminishing the amount of productive capital they are depriving the farmer of his market, the wage-worker of his employment, the transportation system of its freight and the business man of his trade. At a time when the great need of the world is markets and productive industry, governments are pretty generally engaged in trying to restrict markets and to penalize production. Ignorance, the old enemy of human well-being, is still powerful and active.

Then, too, it must be recognized that the new economic and political conditions that have followed upon the English and French Revolutions have steadily shifted the basis of government from force to good will. Force in dealing with the evil-minded, the evil-dispositioned and the recalcitrant will doubtless always have a large part to play; but force can no longer be resorted to in dealing with many of the most important problems of government. A striking illustration is offered in the case of Ireland and the settlement of the relations which the Irish people are to bear to the commonwealth of British nations. The stronger party in the discussion might theoretically resort to force and insist upon the settlement of its own choosing; but the stronger party has long since lost the disposition to do so and is now striving to settle this long-standing issue in terms of good will. It results from conditions like those that the selfish, the narrow-minded, the ignorant and the men of ill-will may, if numerous enough, or if so organized as to exert their united power at a critical point in the economic structure of the state, cripple the state and subvert the public interest far more completely than great armies and navies could ever do.

There are those in our own land and in other lands who, reflecting upon all these things, would despair of democracy and stand aside while it rushes to certain ruin. They are wrong. Every other form for the government and guidance of human association has been tried and found wanting. To return to autocracies or to conscious oligarchies would be quite impossible. The diseases and growing pains of democracy must be dealt with as such, and the American people are called upon, by reason of the greatness of their opportunity, to lead the way in carrying forward democracy to a condition of permanent and sturdy health. This cannot be done, however, unless the American people are prepared to rise above the smallness, the selfishness, the dogmatic self-satisfaction that are now so much in evidence and face the problems of life and of society as they are in a spirit of confident hope, of national humility and with a firm grasp upon those instruments of progress which are the hard-won principles of the generations that are gone.

Outstanding Important Amendments to Revenue Act of Interest to Those Organizing and Reorganizing Corporations

(From The Corporation Journal, Dec. 1921)

(1) Section 202 of the Income Tax Law before the amendment of 1921 provided upon reorganization or consolidation, where the aggregate par or face value of new stock received was in excess of that turned in, the person turning in the same was subject to tax on the amount of shares received in excess of the par or face value turned in. This feature of the act was a great discouragement in the organization of new corporations taking over inerests in old ones, and to reorganizations generally. This section is now amended so that it provides that "when in the reorganization of one or more corporations a person receives in place of any stock or securities owned by him, stock or securities in a corporation a party to or resulting from such reorganization" no gain or loss shall be recognized "even if the property received in exchange has a readily realizable market value." The act defines reorganization so as to include an instance where there is an acquisition by one corporation of at least a majority (1) of the voting stock and (2) of the total number of shares of all other classes, or of substantially all the properties of another. The term also includes recapitalization.

(2) The matter of receiving stock upon the original organization of a corporation in exchange for property is changed, so that even *where the stock received has a market value,* no tax is imposed where those transferring their property secure control of the company in exchange for their property. ("In control" is construed to mean "when owning at least 80% of the voting stock and at least 80% of the total number of shares of all the classes of stock of the corporation.")

(3) Another outstanding important amendment is the one reducing the stamp tax on the issue of shares of non-par value when the actual value is less than $100 per share. The act as amended imposes a tax of 5 cents per share "unless the actual value is in excess of $100 per share, in which case the tax shall be 5 cents on each $100 of actual value or fraction thereof, *or unless the actual value is less than $100 per share, in which case the tax shall be 1 cent on each $20 of actual value, or fraction thereof.*"

EDGAR HOWARD FARRAR

EDGAR HOWARD FARRAR, of New Orleans, former president of the American Bar Association and veteran member of the Louisiana Bar, died at his Gulf Coast home in Biloxi, Mississippi, January 6, of pneumonia, at the age of 72.

EDGAR HOWARD FARRAR

Mr. Farrar's long career was notable not only for professional activities but also for his interest in and services in connection with public affairs. He was particularly interested in the affairs of New Orleans and Louisiana and was one of the most prominent figures in his city and state. He was considered an authority on tax law and in the constitutional convention of 1913 he prepared practically all of the revenue legislation. He served as chairman of the Tax Commission of his State. He led the vigorous campaign which resulted in the adoption and installation of a modern sewage and water system in New Orleans and drafted all of the legislation under which it was organized. He took a leading part in the campaign in Louisiana which defeated the proposition to extend the charter of the Louisiana State Lottery. During the Mafia troubles in 1890 he was chairman of the Committee of Safety organized in his city. For years he was also chairman of the Executive Committee of One Hundred created to reform the municipal government of New Orleans. He was also one of the trustees of the Tulane educational fund to found a university in Louisiana and rendered valuable services in that connection.

Mr. Farrar attained national prominence as the temporary chairman of the Gold Democratic Convention which nominated Palmer and Buckner. In 1907 he again attracted public attention by a letter to President Roosevelt, advancing the contention that under the Post Roads Clause of the Constitution, Congress had full power to enact laws for the control of both interstate and intra-state railroads. The publication of this letter provoked considerable criticism and in answer to it Mr. Farrar prepared a pamphlet which was circulated widely among the profession at the time and is regarded as a masterly presentation of his view. He was one of the counsel with Samuel Untermyer for the Pujo Congressional Investigating Committee during the Wilson administration, and he was also counsel for Edward Hines during the Lorimer Investigation of 1910. Long an active member of the American Bar Association, he was elected president of the organization in September, 1910.

Mr. Farrar was admitted to the bar in 1873, after having received a degree from the University of Virginia in 1871 and having completed his law course at the University of Louisiana. In 1879 he entered public service as assistant city attorney, two years later becoming city attorney. Shortly after this he entered into partnership with the late Ernest B. Kruttschnitt. Later, former United States Senator B. F. Jonas was associated with them, thus forming the firm long and well known in Louisiana legal history as Farrar, Jonas and Kruttschnitt. Still later he became the senior member of the law firm of Farrar, Gildberg and Dufour. During his professional career he represented some of the largest corporations in the state. It is stated that he drew the ordinances and necessary contracts to consolidate the New Orleans street railway lines, and that practically all of the important bond legislation in the state for a period of forty years was handled by or through him because of his wide knowledge concerning this branch of business. He represented Stuyvesant Fish, former president of the Illinois Central Railroad, in the contest with Harriman.

Mr. Farrar was born in Concordia Parish, La., June 20, 1849, son of Thomas Prince Farrar and Anna Girault Farrar. His early education was received at school in Baton Rouge. In 1878 he married Miss Lucinda Davis Stamps, a niece of Jefferson Davis, who survives him. He is also survived by two sons and five daughters—Stamps Farrar, Thomas Farrar, Mrs. Mary Farrar Goldberger of Washington, D. C., Mrs. Anna Goldborough of Biloxi, Mrs. James Wood of Cuba, Miss Edith Farrar of Chicago, and Miss Mildred Farrar of Biloxi.

At the recent meeting of the Executive Committee of the American Bar Association at Tampa, Fla., a resolution was passed expressive of the regret of that body on receiving the news of Mr. Farrar's death and requesting Mr. W. O. Hart, chairman of the General Council, to prepare a suitable message of sympathy to the family.

PRESIDENTIAL "INABILITY"

A Subject of Periodic Discussion in Congress and Out for More Than a Century and a Quarter Which Still Remains Unsettled

By URBAN A. LAVERY

Legislative Draftsman Illinois Constitutional Convention, 1920-22

THE Federal Constitution provides for the "inability" of the President in the following words:

> In case of . . . inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President . . .[1]

This provision has been the subject of periodic discussion in Congress and out for more than a century and a quarter; but the question—Who shall decide the issue of "inability"?—still remains unsettled. The illness of ex-President Wilson again brought the matter to the front. Several bills dealing with this question were introduced into the last Congress, and the public press has recently commented on the desirability of correcting this "defect" in the Constitution.[2] It, therefore, seems fitting at this time to review the history of previous discussions of this subject, and to consider whether legislation by Congress—which is the plan generally urged—would really solve the problem.

At the outset it should be stated that this precise question was considered by the framers of the Constitution. When the Convention was discussing the proposal of the Executive Department, Mr. Dickinson asked:

> What is the extent of the disability, and who is to be the judge of it?

Dickinson made the point that the language of the provision was vague, and, upon his motion, the matter was postponed for further consideration. When the provision again came up for discussion it was adopted without change in its present form. The Convention seems to have decided to leave the question open (as it left many other matters of a controversial nature), relying on the political good sense and stability of the people to solve it under the circumstances of the particular case whenever the issue might arise.[3]

This language of the Constitution first came up for construction in 1792 when Congress passed the first Presidential Succession Act.[4] As in all other attempts by Congress since to consider the subject of Presidential Power, a heated controversy arose. Because of Hamilton's opposition to Jefferson, who was then Secretary of State, the Act made the succession (after the Vice-President) go to the President pro tem of the Senate and the Speaker of the House, respectively, instead of to the President's Cabinet. It is not clear to what extent the question of "inability" was discussed, because the proceedings of Congress were not reported in the full manner of the present. In any event, the Act made no effort to define "inability" or to consider it in any way. Congress did not attempt to go beyond the power expressly granted further on in this same provision:

> . . . and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice-President, declaring what officer shall then act as President . . .

The precedent of the Federal Convention only five years before—when it refused to solve the question of "inability" in advance—seems to have been regarded as controlling.

This provision of the Constitution was again before Congress in 1820, when the Senate by resolution directed its Judiciary Committee to examine the question and report whether it was advisable to change the Act of 1792; for the obvious defects of that Law had been recognized from the beginning. However, the Committee reported against further legislation and nothing was done. In 1841 there occurred the first instance of Presidential Succession, with the death of President Harrison, and the coming into office of Vice-President Tyler. Because of the short illness of Harrison, no question of "inability" was involved. In 1856 the questions of "inability" and of "succession" both came before Congress again, when the Senate, for the second time instructed its Judiciary Committee to investigate and report on the advisability of further legislation. The Committee brought in a report which has often been referred to and was much discussed in the debates of Congress a generation later. However, for the third time Congress refused to take action regarding "inability." Moreover, nothing was done to change the Succession Act of 1792.

President Lincoln lived but a short time after he was shot in 1865, and no question of "inability" arose on that occasion.

The serious defects in the Succession Act became apparent with almost terrifying suddenness when President Garfield was shot in 1881 and died after a protracted illness of several months. Congress had not yet convened for its first Session, and neither a President pro tem. of the Senate nor a Speaker of the House had been elected. When Vice-President Arthur became President in September of that year, there was no officer in existence legally capable of succeeding him, and there could be none until Congress convened in December, or was called in a special session. The country was rightfully disturbed over the situation. A bill was promptly introduced in the Senate proposing to repeal the Act of 1792 and make the cabinet officers succeed the Vice-President. The question of "inability" was again discussed in Congress as a part of the larger question of "succession," but again Congress refused to attempt to legislate on the question of "inability." The "Succession" Bill—the first attempt in 90 years to change the existing law—failed to pass, because of the controversies it raised, in spite of the impelling illustration which Congress had before it.

At the next session of Congress, in 1882, Senator Hoar of Massachusetts introduced a bill making the same general changes in the Succession Act, and again omitting any consideration of "inability. Both questions, however, were debated in considering the bill, and radical differences of opinion on both of them

1. U. S. Const. Art. 2, Sec. 1.
2. See particularly, editorial in N. Y. Times, December, 1921.
3. See Elliott's Debates. V. 5, p. 480.
4. Act of Mch. 1, 1792, ch. 8; 1 Stat. L. 240.

were expressed. Again the Bill failed to pass. In 1883, the fight for the "Succession" Bill was renewed, and although it passed the Senate, it failed to pass the House. Two years later Senator Hoar again presented his Bill and it became a Law January 19, 1886.[5] It will thus be seen that five years of continuous struggle in Congress, following the death of Garfield, were required to effect the repeal of the Succession Act of 1792, and the difficulty of reaching an agreement on the much more controverted question of "inability" may be imagined.

The death of President McKinley in 1901, followed so promptly after his injury that no question of "inability" arose. The illness of ex-President Wilson raised the question of "inability," as an actual issue for the second time. As already stated, several bills were introduced in the last Congress, all of which attempted to set up some commission or machinery for deciding when "inability" arises. None of these bills, however, came near to passage; in fact, they received little consideration or debate.

Such an outline history of this subject makes two points stand out clear. First: There have been but two occasions in our entire national history of 132 years when the question of "inability" actually became acute, and under the law of probabilities the danger here involved seems to have been exaggerated. Second: The practical difficulty of reaching an agreement in Congress upon such a controversial question as Presidential "inability" is very great; aside from what the Executive or the Supreme Court might think of Congressional action.

Coming now to the question whether Congress has power to determine what shall constitute "inability" and set up a court or commission to pass on the problem, it is likely that in case of "inability," either one of two situations will arise: A. The "inability" will be open and notorious, and acknowledged by public opinion everywhere, as where the President would be stricken with total paralysis, or become openly and apparently insane. B. The "inability" will be open to doubt, and a momentous controversy will at once arise; one faction or party will assert that "inability" exists, while the President and his followers and his party will as surely deny it.

In the first case, there would be no occasion for any legal machinery; the Constitution would become self-executing since public opinion (which after all is the only Supreme Court in the matter) would everywhere admit the "inability" and insist on the Vice-President taking over the office. In the second case, public opinion would be split along party lines, dividing the country into two great camps. It is obvious that in actual practice, the only use made of an Act of Congress would be in case of disputed "inability."

In the debates on the question of "inability" in the past, there have been eminent authorities on both sides, but most of the great speeches in Congress have denied the power of that body to act. This is probably due to the fact that in Congress—as well as out—it is generally assumed that Congress has power to pass a law until the contrary is proved. In any event, during the very able debates on the question from 1881 to 1886, the burden of the argument seems always to have been assumed by those who opposed action on the part of Congress. The debates of that time were historic and were taken part in by some of the greatest lawyers who have ever sat in Congress. Accordingly, liberal quotations from those speeches will not be out of place.

In his first message in December, 1881,[6] President Arthur recommended that Congress consider the questions raised by the illness and death of Garfield. Of course, the President did not express an opinion one way or the other as to "inability," but he indicated that the right of Congress to act in the matter was open to serious doubt and would be powerfully assailed. The President said in part:

> Questions which concern the very existence of the Government, and the liberties of the people, were suggested by the prolonged illness of the late President and his consequent incapacity to perform the functions of his office.
>
> Is the inability limited in its nature to long continued intellectual incapacity or has it a broader import? What must be its extent and duration? How must it be established?
>
> Has the President, whose inability is the subject of inquiry, any voice in determining whether or not it exists? Or is the decision of that momentous and delicate question confided to the Vice-President? Or is it contemplated by the Constitution that Congress shall provide by Law precisely what should constitute inability, and how and by what tribunal and authority it should be ascertained?

Senator Hoar, who was the real author and the successful champion of the present Law on Presidential Succession, was asked in the debate in the Senate (December, 1885) what he would say as to "inability." He replied:

> The Constitution has left it a difficult question as to what constitutes inability; and how the question of inability shall be ascertained; and what shall happen when an officer has ceased temporarily to act as President, if the inability or disability be removed. All that class of questions is left (by his Bill) where the Constitution now leaves them, without undertaking to settle the problem.

Senator Hoar seems never to have stated positively his opinion that Congress was without power in the matter, but his position on the question (especially on the wisdom of attempted action by Congress) will be appreciated from his remarks just quoted.

Senator Evarts of New York took a leading part in the debate, and his words were listened to as one who was considered the ablest Constitutional lawyer of his time, either in Congress or out of it. He had been Chief Counsel for President Johnson in the Impeachment Trial, and had also been the leading counsel for the Republicans in the Hayes-Tilden Controversy. In supporting Senator Hoar's Bill, and in answering the criticism that the bill did not dispose of the question of "inability," Senator Evarts after referring to the fact that he "had had occasion professionally heretofore to give a very thorough examination into this Constitutional provision," said:[7]

> The Bill is not only entirely constitutional, but the only possible constitutional exercise of the very limited power that is accorded by the Constitution to Congress. There are two general propositions, I think, which all students of the Constitution will admit without question. One is that the frame of the office of President has its origin of authority from the direct action of the people in a channel worked out by the Constitution. (The other is that) the purpose variously expressed and written all over the action of the Convention in this matter, was that Congress shall not participate either substantially or circumstantially in the election of the President of the United States. . . .

Senator Evart's speech contains many references to

5. Act of Jan. 19, 1886, Ch. 4; 24 Stat. L. 1.

6. Congressional Record, Dec. 6, 1881.

7. See for Senator Evart's speech, and also for speeches quoted hereafter, Congressional Record, Vol. 14, Pt. 1, Dec. 15, 1881, et. seq.

the slight duty and authority of Congress in the matter. His discussion is full and able, but one more quotation will suffice:

> In case of disability which should affect both officers elected (President and Vice-President), Congress may do what?—What did the Constitution say?—that Congress shall have by settled law, changeable, of course, which has received the concurrence of the President of the United States, power to declare, first, what officer shall then act as President, and then on that designation, Congress has exhausted its power. . . . Now was it not a very precise way used by the framers of the Constitution when they said that all Congress could do was to declare what officer should fill the place?

Senator Garland, who was also a great lawyer, was a staunch supporter of Senator Hoar's Bill, and in fact had introduced a similar bill on his own account during the previous Congress. During this debate he made a long and exhaustive speech in the Senate, in which he said:

> I state here as a result of my deliberations and the result of my inquiry into this matter, that we cannot provide against the perplexing question of when "inability" arises, and who is to determine it. Just as much has been said about that in my opinion in the Constitution as can well be said about it, unless we undertake to amend the Constitution.

Senator Garland called attention to the fact that the various state constitutions have similar provisions as to the "inability" or "absence" of the Governor, and the right of the Lieutenant Governor to act. He gave a list of instances in which a Lieutenant Governor had temporarily acted as Governor, and said:

> No tribunal has even been appointed in any state to test the question of "inability"—and no mixed commission, no judges, no lawyers can settle when the thing takes place.

The conclusion which Senator Garland reached was that in case of any dispute as to "inability," the question must be left to an amicable adjustment between the President and Vice-President; and that the President must remain in office until that agreement is reached. There is much to be said in favor of the practical construction for which he argued:

> When you analyze the history of the adoption of the provision you will find that it was intended to be left with the President and Vice-President themselves to settle the question as a matter of comity. . . . The makers of the Constitution spoke as wisely as they could on the question; in other words, the portion of the Constitution in relation to the President and Vice-President of the United States are self-executing. That is the doctrine. It is not intended for Congress to put its finger into that business at all, because it is interfering with a separate, co-equal, co-ordinate department of the Government.

Senator Garland went further and discussed the futility of such a law even if it were passed:

> But now suppose we are over this difficulty (that of the power of Congress); suppose we were through with it; let us look at the practical operation. Suppose we take the plan of the Senator from Texas, Mr. Maxey, which I believe is at least as feasible as any other, if not more so. You will have your judges; you will have your doctors; well, they go to the White House and they say: "Mr. A. we have a presentiment, by some means or other, that you are not able to discharge the duties of this office, and we propose to try it." Very well, the Vice-President stands off somewhere, and of course, as his right is involved, he must be notified. There must be a day in Court for both of these parties. You must have witnesses and lawyers and when would you get through with the trial, how long would it take? . . . Suppose the tribunal adjudicates —That "A, you are unable to discharge the duties of this office; you must get out." A. says: "I will not get out; I am President of the United States, and there is no Court in the world has the right to say I am not President." What are you going to do about it? Where is your remedy? You have none; there is none. Because, standing there he is the head of where all the power comes to an end. He has the cabinet behind him and he says "If you do not get away I will call out the army to take care of you." Where is your remedy? You have none.

Senator Jones and Senator Lapham also took a leading part in opposing any interference by Congress in regard to "inability." They were both of the opinion that if legislation was necessary, it would have to be made by Constitutional amendment. Their speeches, and also the speeches of other Senators who took part in the debate on both sides, should be read by anyone making a study of this question.[8]

Shortly after the death of Garfield, the matter was of so great moment that the North American Review, in November, 1881, published a symposium on the question of "inability," written by four eminent authorities: Ex-Senator Trumbull of Illinois, General Benj. F. Butler, Judge Cooley and Professor Dwight of Columbia University Law School. The articles were referred to at length in the Congressional debates in the following December. Senator Beck, who discussed them, was correct in saying:

> . . . these distinguished gentlemen not only differ among themselves, but no two of them take the same view.

Ex-Senator Trumbull's article was the ablest of all. He argued with great force that Congress has no power to legislate on the question of "inability," and that, furthermore, efforts to legislate on the matter would not be recognized. Trumbull's views were listened to with great respect in Congress, for in the Impeachment Trial he had stood out as a Republican, against the clamor of his party, and had practically cast the deciding vote in favor of Johnson. His discussion on this subject is in a class with that of Evarts. He said:

> It would be dangerous to vest the power of superseding the President in a petit jury, or in any judicial tribunal. . . . There are some things of which everybody takes notice and which it is never necessary to prove; among them are public matters affecting the government of the country. . . . So in case of "inability" the fact must be so notorious that there can be no reasonable doubt about it, nor that an emergency exists requiring immediate action on important matters, before the Vice-President would be warranted in assuming the duties of President.
>
> When such a case arises the people will not only acquiesce in the discharge of the presidential duties by the Vice-President, but will demand that he exercise them. . . . It is questionable whether any law can be framed placing this question of "inability" in a better position than the constitution has left it. The degree of proof required to satisfy the public mind cannot be previously defined. This is a people's government, and can only be maintained by the will of the people. . . .
>
> They take notice of public matters affecting the Government of the country, of who is President, of his health, or "inability," and of the accession of another to the duties of the President. . . . Any Vice-President who should assume to take those duties in a doubtful case when the exigency did not unquestionably require it, would be treated as a usurper by all patriotic citizens. Peaceful succession to the Presidency under our system of Government must always depend on a sound public opinion supported by the good sense, and the intelligence of the people, and there it is safest to leave it.

Looking at the matter dispassionately, and having in

8. Congressional Record; see previous note.

mind what history has shown of similar controversies in the past, these words of Senator Trumbull seem to sum the matter up with persuading force.

General Butler, in his article, agreed that Congress is without power. He further called attention to the fact that any tribunal which might be set up by Congress would be considered partisan by those who disagreed with it. In proof of this he referred to the Electoral Commission of 1876, which settled the Hayes-Tilden dispute. That Commission was made up of five Republicans and four Democrats, and, as is well known, the Commission split along party lines on every vote. Butler said, in speaking of that body:

> If the majority were right it was because they were Republicans. If the minority were right, it was because they were Democrats. If either were right it was because they were politicians.

Butler argued, from this precedent, that a fair and dispassionate trial as to "inability" could never be expected.

Judge Cooley and Professor Dwight both argued that Congress is the proper body to decide the question. But a study of their views shows that the theory behind the view of each is simply this: Congress must have the power, inasmuch as the Constitution does not give it to anybody else. Both of these authorities, moreover, practically admitted that the circumstances of the particular case should control; and that legislation by Congress in advance would probably not serve its purpose.

Professor Dwight referred to the history of England as furnishing an interesting precedent in the reign of George III, who became insane in 1788. It was then generally admitted and widely known that the King was unable to carry on his duties, and was in fact, entirely incapacitated. There was no dispute as to "inability," and there was nothing to be done except to go through the proper forms of setting up a regency. Accordingly, the Privy Council called before it the King's physicians, who reported unanimously that the King was wholly incapable of attending to public business. The report of the Privy Council was then laid before Parliament. Each house of Parliament thereupon appointed a special committee, which in turn made an investigation in its own account, calling before it the King's physicians. The two Parliamentary committees confirmed the report of the Privy Council. Thereupon, Parliament proceeded to take the necessary steps to establish the regency. The King later recovered; but again, in 1810, became insane once more. The second time the question was disposed of by Parliament in the same way.

The case of George III, however, is more interesting than helpful. It must be remembered that England does not have a written constitution dividing the powers of Government as we do in the United States. There is no similarity, in such a question as this, between the power of Congress and the power of Parliament. In England, Parliament is admittedly supreme, having power even to alter the Constitution of the realm; moreover, Parliament exercises many executive functions. With us the contrary rule limits Congress in both particulars. The English precedent, therefore, cannot be properly cited as an authority.

Another case of interest, but of little help, arose in New Hampshire, where the Supreme Court of the State, after a hearing on the question of the "inability" of the Governor, issued a writ of mandamus directing the President pro tem. of the Senate to act until the Governor recovered.[9] But in that case, as in the case of George III, there was an open and notorious condition of "inability." In fact, the disabled Governor himself really initiated the proceedings by writing a letter informing the Attorney General that he was "disabled" and instructing that officer to take such steps as should be proper.

Attention should be called to one phase of the matter which has seemingly been overlooked in the debates in Congress and elsewhere, but which is of the utmost practical importance. If a decision as to "inability" should be made by any commission or court, the problem is only half answered. There remains the equally difficult question as to when the "inability" ceases. That question would probably quickly arise and would be as bitterly contested. Then the shoe would be on the other foot, and the Vice-President (almost certainly) would be resisting the claim of the President that his "disability" had ceased. In the event of a dispute as to "inability," therefore, it will be seen that the litigation would be endless and fraught with the severest consequences for the peace of the country.

It must be remembered that such controversies are like the fable of Pandora's Box—when once let loose they cannot be recalled at will. Moreover, they raise the bitterest passions of the people, and lead directly to violence. On this point the recent Life of Joseph H. Choate[10] is interesting, where Choate speaks of the Impeachment of President Johnson, and also of the Hayes-Tilden controversy. Choate was a law partner of Senator Evarts, who, as already stated, had been the leading lawyer in both of those trials. Speaking of the Impeachment Trial, Choate says (p. 118):

> It seemed to me at the time that the impeachment of the President was one of those high-handed and desperate attempts which are sometimes made in seasons of great party excitement, not only to oust the President from office, but for the time being to paralyze the executive office itself, and to usurp on the part of the House of Representatives the whole executive power of the Government. The purpose of the impeachment, if they could succeed in removing the President, to put the office in the hands of an extremely zealous leader of the party, was never disavowed.

In discussing the "Electoral Commission," Choate is more cautious about expressing his opinion, and yet his words correctly describe the danger to the public peace in such controversies, when he says (p. 119):

> The Electoral Commission was a very rare and absolutely unique form of litigation as a means of settling a contested election for the Presidency, and although it had no international bearing, it put to a severe test the possibility of adjusting such a contest without resort to force. If Mr. Tilden had been more pugnacious and had really claimed what his followers all believed—that he was entitled to a plurality of votes of some two hundred and fifty thousand—a contest of force for the position might well have taken place, as General Grant, then President and Commander-in-Chief of the Army and Navy of the United States, would certainly have resisted the claim.

A contest over the question of "inability" would follow the history of kindred issues in our national life. Partisan feeling would largely submerge the merits of the case. It was partisan feeling between the followers of Jefferson and Hamilton that produced the Succession Act of 1792. It was partisan feeling that brought about the impeachment of President Johnson—resulting in a trial which is the nearest analogy we have to what would probably occur in a trial of presi-

9. Attorney General v. Taggart, 66 N. H. 362.
10. By Edward S. Martin, 1920.

dential "inability." It was stated by Senator Garland in the speech already discussed, that partisan feeling between two factions of the Republican Party really kept President Arthur from being called on to exercise the presidential functions during the long illness of President Garfield. It was partisan feeling that dominated the Hayes-Tilden controversy, and dictated the votes of the Electoral Commission. It is unquestioned that any attempt to try the "inability" of ex-President Wilson would have met with the vigorous opposition of the President and his followers.[11]

The conclusion seems obvious. The academic question of the power of Congress to pass on the "inability" of the President can hardly be answered in advance. Eminent authorities will decide it both ways—until, perchance, Fate may some day put the issue to the test. As a practical matter—with the record of the past before the country—the wisdom of attempted action by Congress may well be doubted. A President who was disposed to resist would, as Senator Garland has shown, make action by Congress seem worse than futile, because the President would simply defy Congress. It seems equally certain that no steps would be taken under any such Act of Congress, unless the President and Congress were at odds; or unless some political cleavage of another kind existed; because, otherwise, the matter would be amicably adjusted.

Some well known English writer (it may have been Bagehot) has said that the Constitution of the United States was a great instrument, but that it did not deserve all the praise it got, because the genius of the American people for self-government should never be forgotten. "The American people," said he, "would make any Constitution work." Is there not wisdom in that point of view? Does it not seem best, in the matter before us, to trust the good sense and political instincts of the people at the time; rather than set up in advance machinery which may work ill or well in the distant future? In short, is this not a case where "it is better to let sleeping dogs lie"?

11. See "Woodrow Wilson as I Know Him," by Joseph P. Tumulty, p. 444.

FROM CONTRACT TO STATUS

Consideration of How Far Legal Order of Today Attempts to Put Men and Their Activities Into Legal Category of a Status In Order to Realize Certain Ends

By PROF. E. F. ALBERTSWORTH

Dean of Law School, University of Wyoming

SIR HENRY MAINE, founder of the English Historical School of Jurists, writing in 1861, believed that the course of legal history generally could be explained as a progress from status to contract, from a period where legal institutions paid no regard to volition to one where will was chiefly emphasized.[1] He was led to take this position by a long and careful study of the Roman Law and the law of primitive peoples. It has been pointed out by a leading American jurist that Maine's generalization was undoubtedly true in the Roman law, but not in the Common law, where the central doctrine, from which all liabilities and duties flowed, in the absence of volition, was one of relation.[2] The problem now to be investigated is, How far is the legal order today attempting to put men and their activities into the legal category of a status, in order perhaps the better to realize those ends for which the law exists? Can it be said, then, that there is progress in the larger sense, if it appears that status is once more receiving emphasis?

When Maine wrote, the dominant viewpoint of Civil and Common Law jurists and philosophers quite generally was, that the end of the legal order was to secure to individuals a maximum of individual self-assertion or liberty. Law and the State were believed to have arisen to secure and conserve this liberty, these natural rights of the "abstract" man; this was the inheritance from the Eighteenth Century Natural Law School. Moreover, the reforms inaugurated by the Benthamite program were in full swing, the conception of Bentham and his followers being that men should be unshackled and set free from the traditional rules, and that that government was best which governed least; legislation was an evil, and the less of it the better.[3] In the same spirit, Kant had attempted to solve the problem of the authority of law and the State on the one hand, with the freedom of the individual on the other, by postulating a common rule of freedom according to which the will of one might be reconciled with the will of the many.[4] Hegel, writing after Kant, had looked at law as the expression of the Idea of liberty unfolding a priori or logically in human consciousness; while Savigny, contemporary and colleague of Hegel, had likewise looked for this principle of freedom and free will, unfolding in the life of a people. The French Revolution, which was then fresh in the experience of all, had set free tendencies toward individualism, which seemed to corroborate in the world of fact that which jurists and philosophers were agitating in the realm of theory.

While the zeal of these men to bring about greater individual liberty resulted in many reforms ,particularly in ridding the body of the law of inherited abuses and conceptions which no longer functioned for that time, it is undoubtedly true that their conception of liberty, degenerating into that of the abstract man, with little attention paid by courts or counsel to the actual de facto social and economic conditions, brought about

1 Ancient Law, Chapter 5.

2 Roscoe Pound. The End of Law as Developed in Juristic Thought, 30 Harv. L. Rev. 211.

3 "Liberty, the first of blessings, the aspiration of every human soul, is the supreme object. Every abridgement of it demands an excuse, and the only good excuse is the necessity of preserving it. Whatever tends to preserve this is right, all else is wrong." Carter, Law; It's Origin, Growth and Function, 336.

4. Metaphysische Anfangsgrunde der Rechtslehre, 27 (1797).

serious checks to much of the social legislation of the immediate past. It led to what Rudolf Jhering on the continent and other jurists in America called "A jurisprudence of conceptions," to a process of drawing legal inferences from some abstract legal principle and then applying this deduction to the case in hand, rather than attempting to fit the case to the principle.[6]

And in this connection it is interesting to observe how the courts which decided cases under the influence of the ideal of individual liberty, where liability was supposed to flow in both tort and contract from voluntary action and exertion of the will, explained those situations in the law where this was not the case. The absolute liability imposed by the law on the owner of trespassing cattle was explained on the dogmatic fiction of negligence;[6] or by the fiction of representation in case of servants and agents, whereby the fault was made to appear that of the principal or master;[7] and by implying promises in cases of inequitable retention of benefits; by annexing duties to certain relations and callings, or lastly, as historical or archaic survivals.[8] As a matter of fact, all these were instances of liability without fault where volition was not regarded; but as long, as in England, the social order was a settled community it was undoubtedly necessary, and the reasons given by the courts for the "exceptions" appeared to be satisfactory. And in America, a pioneer community, where the general security was not so liable to be impaired because of sparsely settled communities, the principle of no liability unless fault was gradually left to die out. But as conditions in this country became more settled, as they are today, the old idea came to rebirth; and it is this new phase and its consequences in which our interest at present centers. For the conception of relation is intimately bound up with the idea of liability without fault.

In the Granger cases,[9] decided more than twenty years ago, Mr. Justice Brewer, an individualist of the old school, as his colleague Mr. Justice Field, protested to putting the business of warehouses in a certain status, whereby they would be compelled to furnish such services on such reasonable rates as the legislature might prescribe, voicing his objection in these words: "It seems to me that the country is rapidly travelling the road which leads to the point where all freedom of contract and conduct will be lost." Nevertheless, if any practice has become well established in our law today it is that of requiring certain businesses, whether their owners willed so or not, to do and not to do certain things merely by virtue of their status. The persistence of hostility to this notion may be attributed in part to the laissez faire economics and individualistic legal doctrines of the nineteenth century, which the judges permit to color their view of legislative policy and legislative enactments; and in part also to an archaic conception of the nature and purpose of the law—either that it is a body of legal principles and rules which human effort cannot consciously change, and that the law exists to secure the maximum of individual liberty, and not, as appears to be the dominant view of the present, to secure a maximum of human wants with the least sacrifice of other human needs.

Our whole law of workmen's compensation is based upon the principle of liability without fault, or in other words, because of a certain status into which the employer has been placed, irrespective of his volition, certain duties and liabilities flow therefrom. The statutes dealing with this beneficent phase of the law usually provide for liability of employers, especially in hazardous occupations, for death or injury of any employee due to conditions of such occupation in all cases in which the employee was not contributorily or wilfully negligent. Some of the more liberal statutes abolish contributory negligence, assumption of risk, and the fellow servant rule, as defenses for the employer.[10] While the judiciary is gradually accepting this principle of a status of the employer and the employee, regardless of their volition, yet the five to four decision of the Federal Supreme Court in Arizona Copper Company v. Hammer[11] shows the tenacity of the older views inherited from the past.

Moreover, in the gradually increasing output of the state legislatures with reference to minimum wages of workmen, the employer has been denied power or freedom to contract, because of the status into which the law has placed him.[12] Although some twelve or more states now have minimum wage laws, this legislative reform has not been so widely adopted, when compared with that dealing with workmen's compensation.[13] Here again the views of the courts, that what was old was due process, led them to take a hostile attitude toward such innovations; although, as a matter of fact, if the principle or criterion of age be taken, the farther back research is carried it is observed that in the time of Elizabeth wages were fixed by the justices of the peace themselves, while in colonial days in this country, wages as well as prices were quite generally prescribed by the provincial assemblies.[14] And of course the rate of interest on capital was, and still is, prescribed. In recent times, of course, much opposition to minimum wage legislation was raised by the employers. For fixing the wage at a certain minimum, appears on the surface at least to be compelling the employer affirmatively to assist the working men to correct social evils which the employer has not directly caused. However, in answer to this objection, it may be said that the employer who underpays is actually injuring his employees so far as their standard of living, or even a minimum subsistence level, is concerned; and the mass of evidence produced by sociologists clearly shows the need of such legislation if the race is to realize its highest aims, and if civilization is to progress.

The basic doctrine underlying the law of public utilities is that of a relational duty to the public, or one based on the character of the business profession of

5 Pound, The Scope and Purpose of Sociological Jurisprudence, 25, Harv. Law Review, 140-142.

6 So an owner of a cow was held liable for trespass upon land, due to its being turned out of the pasture by a third person without the owner's knowledge or consent, the court quoting from Blackstone as follows: "For if by his negligent keeping, they stray upon the land of another . . . the owner must answer in damages." Here it is seen that the result is called negligence, to make it appear that the consequence flows from culpability. Noyes v. Colby, 30 N. H. 143.

7 Baty, Vicarious Liability, 7.

8 Injuries by Trespassing Animals, 32 Harv. L. Rev. 420; Juristic Theory and Constitutional Law, 32 Harv. Law Rev. 86.

9 Munn v. Illinois, 94 U. S. 113.

10 Frankfurter, Hours of Labor and Realism, 29 Harv. L. Rev. 353; Judicial Acceptance of Workmen's Compensation, 29 Harv. L. Rev. 199.

11 The dissenting opinion of Mr. Justice McKenna is indicative of the present tendency: "There is menace in the present judgment to all rights, subjecting them unreservedly to conceptions of public policy." What is meant is that the social interest in the general security must be the criterion to determine whether certain activities of men should be placed into the category of a status, rather than to permit them to exercise their will freely.

12 Stettler v. O'Hara, 139 Pac. 743, affirmed by United States Supreme Court.

13 Legislative Minimum Wage for Women and Minors, 28 Harv. L. Rev. 89.

14 State Regulation of Prices under the Fourteenth Amendment, 28 Harv. L. Rev. 883; Learned Hand, Due Process of Law and the Eight Hour Day, 21 Harv. L. Rev. 495.

the public servant itself, rather than upon contract or agreement which flows from an exercise of the will.[15] Research into the old common law has brought to light numerous cases in the year-books, running back to Edward IV and Henry VI. But as a result of the emphasis on individualism in England, due to a change from feudalism to industrialism, and the disappearance of the medieval gilds, the old idea of a relation or status giving rise to certain duties irrespective of contract, gradually disappeared, existing only perhaps in the case of inn-keepers and carriers. On the other hand, as a result of the growth of powerful combinations of capital gaining often a monopolistic control over certain fields of industry, and further as new conceptions of the relation between government and industry arose, and as social conditions became more congested and complex, the old idea of relation or status slowly revived and received greater emphasis in the law. At first, the courts talked about the "implied" terms of the contract between carrier and public; or they found a dedication to the public; or again they said the business enjoyed the power of eminent domain. Gradually, however, when no contract could be worked out, nor the other indicia mentioned above could be discovered, the Supreme Court of the United States placed the liability of the public utility squarely on the ground of a status or relation.[16] While some courts still use the word "contract," in talking of public service corporations they really mean status. Several fairly recent cases show the length to which courts are imposing liabilities upon such companies purely through the instrumentality of the conception of relation or status. In Middleton v. Whitridge, [17] the court decided that there was an added duty imposed on a carrier to take care of the passenger who became sick on the journey. So also in Gilkerson v. Atlantic Coast Line R. Co.,[18] the court said there was a duty upon a carrier to wake a passenger so as to enable him to alight at his destination if the conductor actually agreed to do so.[19]

So also as to the law of Insurance, we observe the conception of status or relation imposing many duties on these businesses apart from their volition. In German Alliance Insurance Co. v. Lewis,[20] it was held that a state statute authorizing the superintendent of insurance to establish reasonable rates for fire insurance companies was constitutional. This case certainly rang the death knell on abstract theories of liberty or antiquated economic doctrines. Insurance is a necessity on the part of a great majority of the people, and being at the mercy of powerful corporations, the idea of a relation was here stressed also. Since the decision in the Kansas case, courts have upheld state legislation of various kinds with respect to insurance contracts in general, such as restricting the business to corporations, prescribing standard policies, prohibiting discrimination, providing for increased recovery penalty in case of rate agreements, etc.

While the law of landlord and tenant has always remained one of relationship of status, being inherited directly of course from feudalism, yet recently the idea of relation or status has received considerable enlargement by at least the Federal Supreme Court. In the rent cases coming up from the District of Columbia and New York,[21] the United States Supreme Court made large use of the idea of status in order to hold it constitutional for a state to prescribe reasonable rentals, regardless of the contract between landlord and tenant, and to deny to the owner power to eject the tenant at the termination of his lease. It is interesting to note in this connection how the Roman and Civil Law lawyers would have dealt with such a situation, and as likely before the decisions before mentioned, the lawyers in our own system would have done. Their solution would have been in terms of the will of the parties, the legal transaction being called *a locatio operarum.*' This also undoubtedly would have been a method of legal reasoning or analysis employed by the earlier common law jurists, but certainly today the trend of the law seems to be away from the conception of volition toward status, especially with reference to landlord and tenant. Though severe criticism by the legal profession has been made of these recent rent cases, some extremists saying that it will lead to socialism, nevertheless when the decisions are viewed in connection with the general trend of the law to emphasize the conception of relation wherever public welfare is involved, no other result could have been reached.

Likewise in other fields of the law, the doctrine of status is employed to work out rights and duties. For instance, contracts made between mortgagor and mortgagee as to the sale of the equity of redemption will be given close scrutiny by the courts because of the status of the mortgagor, the courts saying that "a necessitous man is not a free man;" and therefore even though the mortgagor may have made a contract, hence involving act of will, to sell his equity, the courts may not give effect to it. So also in the contracts made between trustee and *cestui,* principal and agent, husband and wife, promoter and corporation, partners *inter se,* and persons in other relationships, declarations of will may receive in the courts no effect, because the law has placed these individuals in a certain status to which the law annexes rights and duties. Moreover, when the question is regarding the tort liability of the owner of land, the question naturally arises whether the plaintiff was a trespasser, a licensee, or an invitee, because once the relation or status is established, certain liabilities and degree of care result.

Is this principle of emphasizing status and relation a wise one? By many, status is felt to be an archaic legal institution which in this day of progress we are supposed to have outgrown. And so some courts have held legislation unconstitutional which sought to protect and enhance the position of the workingman, by giving him higher wages or bettering working conditions on the ground that he was not in the position of a serf who needed special protection.[22] But these are only prejudices inherited from the time when individualism and Roman Law ideas of emphasis on will were dominant in the thought of the time. Today in urban and industrial communities, groups as well as individuals must be reckoned with. A leading jurist in America, who has emphasized the principles of the Sociological School of Jurisprudence, that the law should be a means and not merely an end, and that any legal doctrine or institution should be adopted by the law which leads appropriately toward this purpose, has said with reference to this conception of status, "We may perceive that in the idea of relation . . . we

15 The Relational Duty of the Public Service Company to its Public, 28 Harv. L. Rev. 620.

16 Boston, etc., Ry. v. Hooker, 233 U. S. 97.

17 59 Y. Y L. J. 1621.

18 83 S. E. 592 (S. C.).

19 Weirling v. St. Louis, I. N. & S. R. 171 S. W. 901. The court particularly laid much stress on the idea of relation as opposed to contract

20 34 Supreme Court 612.

21 Hirsh v. Block, 41 Supreme Court R. 458; Marcus Brown Holding Co. v. Feldman, 41, Supreme Court, R. 465.

22 State v. Haun, 50 Pac. 340; State v. Loomis, 225 W. 350.

have an institution of capital importance for the law of the future, a means of making our received legal tradition a living force for justice in the society of today and tomorrow." [28]

If Maine's generalization, that the progress of legal history has been from status to contract, be true only in the Roman and not in the Common law, what can be said is the course of legal process in our own system of law? As we have already observed, the tendency in common law countries is to bring certain fields of human activity within the realm of status or relation. This undoubtedly, as has been shown, places restrictions on volitional activity. In other fields of conduct, or even of contract and property, we find the law imposing many limitations in the interest of the individual and the social group. This is notably the case in limitations upon property, liberty of contract, waste of natural resources, and holding the state to a larger degree of tort liability. In the field of industrial struggles, especially where public welfare and safety are threatened and endangered, we observe a sentiment to preclude actions by labor groups, or by these united with capital, which augurs well not only for a more peaceful settlement of the strike and the boycott, but for preserving social peace and order. In the field of large aggregations of capital, we note a tendency not to condemn as illegal on the sole ground of gigantic size, as in the case of the recent decision by the Federal Supreme Court in the United States Steel case. In the field of procedural reform, in order to bring about a maximum of justice, the objective is to give the courts greater freedom, either in permitting them to make their own rules of practice, or by the legislature passing a short Practice Act, laying down general or broad principles, leaving to the courts large discretion in suspending, adding, or modifying rules. In the delegation of powers to subordinate boards and commissions, the idea has long been abandoned that some metaphysical jural principle required this separation, in order to enhance the liberty of society and the individual; the real reason for some separation of powers being to insure to all a maximum of justice in the satisfaction of human wants. So also in reviewing the findings of these commissions and boards, the tendency appears to be that executive justice, if certain fundamental elements of hearing and notice are present, is equally efficacious as judicial or court justice in securing to individuals and property the interests which they may validly make.

From these tendencies of the law, in its various fields, it may be reasonably inferred that there is an attempt to give an increasingly greater recognition to securing by the law of a maximum of individual and social wants. The underlying conception in the law as well as in other modes of social control seems to be that mankind is moving toward some future goal of not only more perfect human relations, but also of a more complete control over external physical environment. The old law, under the conception that the ideal society was in the past, faced toward the past; the law of the present, under the general prevalent notion of evolution and development, believes the ideal society is yet in the future, and hence its gaze is toward the future, toward progress. This means elimination of much in the law which has been inherited if it no longer functions today, but at the same time it may mean emphasis and retention of those ideas and legal conceptions which function equally well today. There is no escaping the conclusion that certain doctrines and institutions of the law have inherent worth and validity, giving much support to the tenets of the recent Revival of the Natural Law School in France or to the conception of Stammler of a natural law with a varying content. This is true of the conception of relation or status, now coming back so prominently into our law; and other doctrines, such as constructive trust in the common law and excluding the unworthy heir or an implied hypothecation in the Civil Law. The mere fact of a doctrine being ancient should not be a ground of rejecting it; if it has utilitarian or pragmatic value, it should be retained and employed.

This, then, seems to be the direction that legal history and legal institutions at present appear to be taking, namely, that of an attempt to realize a maximum of human wants in order to reach a higher degree of civilization, the latter including more perfect adjustment of human beings to one another, and an increasing control and dominance by mankind over external nature to conserve their needs. The former involves a consideration of human beings as ends in themselves, or as Kant said, "a kingdom of ends," for which the law is to be a means, leads to limitations imposed by the law on the acquisition and use of property, reform of legal procedure in order to get at the substantive merits of the controversy, and finally, more efficient governmental relations to industry through creation of boards and commissions. These seem at present the more pressing needs. But increasing control over nature, which is the second branch of civilization, must likewise not be overlooked. Hence, in order to realize this objective, the goods and natural resources of society must be more evenly distributed, either through ownership or power of control without ownership, involving in some instances a change from *res nullius* or *res communes* into *res publicae*, as is being done in some states today in case of water and oil.

It must never be forgotten that the law is but one form of social control, like religion, general ethics, and the State. The reason for the existence of the law and the State is, not that they protect certain so-called "natural rights," which are supposed to run back and above all constitutions, but that they recognize and protect through legal rights certain interests which subjects or citizens of the body politic may have, being furthered by the law in order to advance civilization. Dealing primarily with external acts, instead of with thought and feeling, as do religion and morals, the law meets a need of which they are incapable. If it does this through recognition of a status in some instances, its objective is to improve the relations between human beings and to enable them to master and control physical nature. This is the goal of the law, rather than some superficial one of from "status to contract."

[28] Roscoe Pound, The End of Law as Developed in Juristic Thought, 30 Harv. Law Rev. 221.

Foreign Jurists' Association at Paris

On October 24, 1921, an organization, known as the "Association of Foreign Jurists" ((Association des Juristes Etrangers) was founded at Paris, with the main object of defining before the French official world the status of properly qualified legal practitioners established in France. The chief qualifications for membership are admission to practise in a foreign country as barrister or counselor at law, attorney or solicitor, good reputation and a minimum period of practice in France or certain French qualifications.

NATIONAL CONVENTION OF BAR ASSOCIATIONS

Program of Legal Education Conference Shows Phases of Important Subject to Be Discussed at Washington Meeting February 23-24.

THE mid-winter session of the Conference of Bar Associations which meets February 23rd and 24th in Washington, D. C., to consider the American Bar Association's proposals on legal education promises to be a most notable gathering of lawyers both on account of the subject to be discussed and the representative character of those who are to attend.

The American Bar Association itself will be represented by its full quota of five delegates and five alternates, and the Conference is now assured that every State Bar Association will send a delegation and that the number of local bar associations represented will probably reach a hundred or more.

By means of this Conference of Bar Association Delegates which was created by the American Bar Association in 1915 that Association has unified and brought into common co-operation all the Bar Associations of the country and in this way has made itself a truly national institution.

While the privileges of the floor will be confined to the official delegations, the Conference of Bar Association Delegates has extended an invitation to all the members of the American Bar Association to attend the Conference as guests. Arrangements have been made for their registration at the Conference headquarters and given tickets admitting them to the sessions of the Conference. The members of the American Bar Association will also be given an opportunity to attend the conference dinner at which the Chief Justice, the Secretary of State, the Attorney General and other distinguished members of the bar are to speak.

The Conference is also made notable by the fact that at the invitation of Judge Clarence N. Goodwin, the Chairman of the Conference, the Chief Justice of the United States, the Secretary of State and former Ambassador John W. Davis will preside over its sessions and the opening address will be made by the Honorable Elihu Root. The President of the American Bar Association, Cordenio A. Severance, will act as toastmaster at the dinner which will close the Conference.

Preceding the evening session of Thursday, February 23rd, the Chairman of the Conference and Mrs. Goodwin will give a dinner party of thirty in compliment to the Chief Justice and Mrs. Taft at the Shoreham Hotel, and at the same time and place other dinners will be given in honor of the Secretary of State and Mrs. Hughes and other distinguished guests of the Conference. Arrangements have been made which will permit all delegates who desire to do so to give or make up among themselves other dinner parties in connection with those noted.

After the dinner the guests will go immediately to the evening session, which will be addressed by Dr. William H. Welch of Johns Hopkins University. It is expected that some time during the Conference the delegates will be received by the President at the White House. President Angell of Yale University is to address the Conference on "Education." The widespread interest in the Conference shows a deep consciousness of the fact that the future of the bar depends in large part on the standards of education and fitness prescribed for admission.

Outstanding Features of Program

Preliminary College Education.—Those who attended the Cincinnati meeting of The American Bar Association know that pre-legal education is a subject which calls for earnest discussion. The American Bar Association has recorded itself as in favor of requiring at least two years of study in a college as a condition of admission to all law schools.

At the Conference the opportunities for the ambitious boy with brains to get a college education will be presented and discussed. The mental and spiritual equipment received in college will be taken up and its value considered. The effect of this equipment upon a law student will be the subject of discussion, introduced like the other discussions, by a paper read by a student of the subject.

The Need for a Law School Education.—The changes in the practice of law which have destroyed the usefulness of the preceptorship system will be outlined and the need for a law-school education considered. Part-time law school training will be taken up, with special reference to the necessity for making the bar accessible to every economic class in the community. In this connection the Conference will consider the differences and the analogies between the professions of law and of medicine.

A Substitute for the Preceptorship System.—In the days of the preceptorship system, a man who studied in the office of a high-minded practising lawyer came daily in personal touch with his preceptor, and thus was enabled to acquire a strong sense of social obligation and a sympathetic understanding of the ethics of the profession. In the modern law school this is possible only in so far as the members of the faculty are able to form personal relations with a large student body.

Can a system be devised to meet this evil? How can the bar associations help? How can the law schools cooperate?

Part of the time of the Conference will be devoted to these questions.

Vigorous Action Is Contemplated.—The Conference will not be simply a forum for the exchange of views. It is designed to give the freest possible scope to discussion and then to agree upon a constructive program with respect to legal education and upon the machinery to carry that program forward. Continued cooperation between the American Bar Association and the state and local associations will be necessary, so that the machinery will necessarily be joint machinery calculated to promote a joint enterprise.

The tentative program prepared by the committee in charge contemplates the introduction of each subject by a short paper or prepared address. This will be followed by general discussion. At the

final session action will be taken upon the various propositions which will have been laid before the Conference. Following is the program in detail:

Place of Meeting

All meetings will be held in the auditorium of the American Red Cross Society Building, Washington, D. C.

Thursday Morning, February 23:

Hon. Clarence N. Goodwin, Chairman of the Conference of Bar Association Delegates, presiding.

10:30 A. M.

Roll Call.
Organization of Conference.
Opening address by Hon. Elihu Root: "The Resolutions adopted by the American Bar Association."

12:30 P. M.

Informal luncheon in the Red Cross Society Building.

Thursday Afternoon, February 23:

Hon. William H. Taft, presiding.

1:30 P. M.

General subject: Preliminary Education.
Topics for discussion:

1. The justification of the proposed requirement of at least two years of college experience and training, in view of the technical education necessary to make an efficient lawyer.
2. The effect of college experience and training in developing the desire and the ability to understand and maintain high ideals of professional conduct.
3. The economic conditions and educational opportunities in the United States which enable the ambitious boy of slender means to obtain at least two years of college training.

Introductory papers: by Samuel Williston of Massachusetts, Topic No. 1; Silas H. Strawn of Illinois, Topic No. 2; James B. Angell, President of Yale University, Topic No. 3.

Thursday Evening, February 23:

Hon. John W. Davis, presiding.

8:30 P. M.

Address by Dr. William H. Welch, Professor of Pathology, Johns-Hopkins University: "The Part Played by the Medical Associations in Recent Advances in Medical Education."

Friday Morning, February 24:

Hon. Charles E. Hughes, presiding.

10:00 A. M.

General subject: Technical Education.
Topics for discussion:

4. The technical education necessary to enable a lawyer to serve the public.
5. The failure of the law office to give an adequate technical education.
6. The part-time law school, and its place in legal education.
7. A method of bringing law school students in touch with practising lawyers of high professional ideals.

Introductory papers: by James Byrne of New York, Topic No. 4; Hon. George E. Price of West Virginia, Topic No. 5; Hon. Oscar Hallam, Justice of the Supreme Court of Minnesota, Topic No. 6; William Draper Lewis of Pennsylvania, Topic No. 7.

1:00 P. M.

Informal luncheon in the Red Cross Society Building.

Friday Afternoon, February 24:

Hon. Elihu Root, presiding.

3:00 P. M.

Final meeting.
Completion of discussions.
Adoption of resolutions.
Adjournment.

Friday Evening, February 24:

7:00 P. M.

Dinner for delegates and members of their families at Wardman Park Hotel. Cordenio A. Severance, President of the American Bar Association, presiding.

Note: If the President is in Washington during the Conference, it is expected that he will receive the delegates.

Delegates when they arrive will please register at the office of the Secretary of the Conference in the Red Cross Society Building. Tickets for the luncheons and for the dinner will be sold at the same place.

Chairman of Local Washington Reception Committee, Hon. H. N. Daugherty, Attorney General of the United States.

National Conference of Commissioners on Uniform State Laws

The mid-winter meeting of the Executive Committee of the National Conference of Commissioners on Uniform State Laws was held at the Tampa Bay Hotel, Tampa, Fla., Jan. 9th and 10th. The following members of the Committee were present: the Chairman, Gen. Nathan William MacChesney of Chicago; the Secretary, Professor E. A. Gilmore of Wisconsin; Hon. W. O. Hart of New Orleans; the Treasurer, Hon. George B. Young of Vermont; Hon. Eugene C. Massie of Virginia; Hon. A. T. Stovall of Mississippi; Hon. George E. Beers of Connecticut.

The Committee among other things considered the budget for the ensuing year. Appropriations were made for the committees on the following subjects: Uniform Aviation Act, Joint Parental Guardianship Act, Chattel Mortgage Act, General Mortgage Act, Declaratory Judgments Act, Incorporation Act. These committees and others will submit drafts of acts for consideration at the next Annual Conference to be held during the week just preceding the annual meeting of the American Bar Association.

On account of his recent appointment as Vice Governor General of the Philippine Islands, Professor Gilmore resigned as Secretary of the Conference and Hon. John B. Sanborn of Wisconsin was elected to fill out the unexpired term.

Chief Justice White's Place in History

"Logical and penetrating in intellect, bold in thought and tenacious in conviction, lofty and unselfish in his devotion to his country it is not too much to say that none of those who have occupied that great seat have filled it more worthily; and when his sculptured presentment comes to join those of his predecessors on the walls of this historic chamber even that immortal company will be the richer for his presence."
—From address of Hon. John W. Davis at meeting in Washington in memory of the late Chief Justice White.

REVIEW OF RECENT SUPREME COURT DECISIONS

Venue of Action Against Carriers Under Federal Control—Subcontractors on Federal Work —Special Assessments for Local Improvements—Enforcement of Decisions of Interstate Commerce Commission—Arbitrary or Unreasonable Order of Same—Fraudulent Joinder—Taxation of Stock Exchange Membership — Conformity of Practice Statute—Interstate Commerce and Restriction of Manufacture—Power of Municipal Corporations to Own and Fix Rates for Public Utilities

By Edgar Bronson Tolman

Carriers (under Federal Control).—Venue of Suits Against

Alabama & Vicksburg R. Co. v. Journey, Adv. Ops., p. 15.

Suit to recover damages for personal injuries was brought in the circuit court of Hinds county, Mississippi, against a railroad then under Federal control. The company pleaded in abatement Order No. 18 of the Director General of Railroads which prohibits the bringing of such suits in the court for any other district than that in which the plaintiff had resided or in which the alleged cause of action arose, and averred that the plaintiff was not a resident of Hinds county when the alleged injury occurred and that the cause of action did not arise in that county.

A demurrer to this plea was sustained, plaintiff recovered a verdict, and judgment thereon was affirmed by the Supreme Court of Mississippi. The case was taken to the Federal Supreme Court by both certiorari and writ of error. The former was held to be the proper procedure and the writ of error was dismissed.

Mr. Justice Brandeis delivered the opinion of the court and on the main question, the learned justice said:

> The supreme court of Mississippi overruled the plea in abatement on the ground that Order No. 18 exceeded the powers conferred by Congress on the President and by him on the Director General. Whether the state court erred in so holding is the only question before us. That it did err is clear from what we said in Missouri P. R. Co. v. Ault . . . decided since entry of the judgment under review. Section 10 of the Federal Control Act of March 21, 1918, . . . permitted enforcement of liabilities against carriers while under Federal control only "in so far as not inconsistent . . . with any order of the President." It was within the powers of the Director General to prescribe the venue of suits; and the facts set forth in the order show both the occasion for it and that the venue prescribed was reasonable.

The judgment was accordingly reversed. Mr. J. Blanc Monroe argued the case for the railway company and Mr. Robert B. Mayes for the plaintiff below.

Contracts.—Subcontractors

Hunt, Exr. Weighel, deceased, v. United States, Adv. Ops., p. 11.

Weighel contracted with the United States to transport mail between designated points in Chicago for a term of four years. He made a subcontract with one Travis to do all the work, and notified the postal authorities of the subletting. During the entire term Travis performed all the work and was recognized as a subcontractor performing Weighel's work, but no copy of the subcontract was filed with the department. The government paid all the sums due under the contract from time to time to Weighel, who settled with Travis. After the contract had been awarded and the work carried on for several months, the Postmaster General ordered Weighel to perform certain mail service from and to street cars, claiming it to be within the scope of the contract, but Weighel claimed it was not, performed it (through Travis) under protest and notified government that compensation therefor would be demanded. The Court of Claims held that the service was extra the contract and found that its value was $52,327.60, but decided that because Travis performed all the extra service, Weighel's executor could not recover.

Mr. Justice Clarke delivered the opinion of the court and concurred with the lower court in holding that the work was additional to that specified in the contract. The learned justice stated the position taken by that court as follows:

> The finding of the court of claims is that while the government had notice that Weighel had sublet his contract, and while in practice it recognized Travis as a subcontractor, yet no copy of the subcontract was filed with the Department, as is provided for in 22 Stat. at L. chap. 116, pp. 53, 54, . . . but that, on the contrary, Travis certified to the Postmaster General that he did not intend that "the contract should be filed for recognition by the department, or as a lien against the pay of the contractor."

Calling attention to the fact that while the government accepted service from Travers it consistently retained its contract relation with Weighel during the entire four years, he said:

> The government did not have, and did not by any implication recognize, any contractual relations whatever with Travis, and if he had failed in performing it, would not have had any right of action against him, for the subletting of such a contract was forbidden by statute, except with the consent in writing of the Postmaster General, which was never given. . . . Weighel was the only person legally bound to perform the original contract; it was from him that the government demanded the extra service, and under the facts found by the lower court the obligation to pay for that service was to him, whether he performed it personally or through another. The government accepted performance of the extra service by Travis precisely as it accepted performance by him of the obligation under the original contract, and the law requires payment to Weighel for the former as much as it required the payment which was made to him for the latter.

The judgment of the Court of Claims was accordingly reversed and the case remanded.

Messrs. Albert Chester Travis, A. R. Serven and Burt E. Barlow argued the case for the executor, and Assistant Attorney General Lovett for the government.

Corporate Stock—Levy and Sale of

Yazoo & Mississippi Valley Railroad Co. v. Clarksdale, Adv. Ops. p. 44.

The city of Clarksdale, Mississippi, in 1891, issued $25,000 of its bonds in aid of the construction of a railroad and in consideration thereof received from

the railroad company 250 shares of its capital stock. In 1897 a judgment was recovered against the city for $3,058.13 unpaid interest on said bonds. The judgment creditor levied on the 250 shares of railroad stock, which were then in custody of a bank, bought them in at marshal's sale for $100, which was credited on the judgment, and obtained possession of the stock from the bank. In 1898 the city effected a settlement with the bond holders, by which they waived interest and costs and the city paid the principal. No mention was made of the stock in the settlement. In 1904 the judgment creditor sold the stock to an investment company for $2,770 and transferred the certificate to that company. The value of the stock, which was little or nothing at the time of the judgment and compromise, had greatly enhanced and at the time of the institution of this litigation was alleged to be $75,000.

The city filed its bill in a state court to compel the railroad company (which had been reorganized and consolidated) to recognize the city's ownership of this stock and to issue to it stock of the consolidated company in lieu thereof. The investment company was made a party defendant to this bill, after the answer of the railroad company had revealed its ownership and the real contest became one between the city and that company.

The state chancery court and the state supreme court declared the marshal's sale of the stock void, because of his failure to comply with the laws of Mississippi concerning executions and sales. His return recited that he sold the stock at the door of the Federal court and postoffice building, whereas the state statute provides that judgment sales should be held at the door of the country court house, and the decisions of those courts were sought to be reviewed both by writ of error and by certiorari.

Mr. Chief Justice Taft delivered the opinion of the court, and after stating the facts and the course of the litigation below, and holding certiorari and not writ of error to be the appropriate method of review, said:

> Counsel for the city attack the sale chiefly on two grounds: First, that the levy was void because made on a mere muniment or indicium of title to the stock, the certificate, and not on the stock itself; and second, that the sale was void because not made at the county courthouse, as required by the laws of Mississippi.

The Chief Justice declared that in applying the law of Mississippi to the validity of the sale, the court must be governed by Secs. 714 and 916 of the Revised Statutes. The former of these is the familiar statute of conformity of practice in the courts of the United States (other than in equity and admiralty causes) with the practice obtaining in the local state courts; the second is the equally familiar provision giving to Federal judgment creditors similar remedies to enforce their judgments by execution or otherwise as those which might be given by state laws.

Counsel for the city also relied upon the act which provided in its first section,

> "that all real estate or any interest in land sold under any order or decree of any United States court shall be sold at public sale at the courthouse of the county, parish or city in which the property, or the greater part thereof, is located, or upon the premises, as the court rendering such order or decree of sale may direct."

and in its second section,

> "that all personal property sold under any order or decree of any court of the United States shall be sold as provided in the first section of this act, unless, in the opinion of the court rendering such order, or decree, it would be best to sell it in some other manner."

Construing these several acts, and applying them to the facts in the instant case the learned Chief Justice said:

> We think that the language of this act limits its application to judicial sales made under order or decree of the court, and requiring confirmation by the court for their validity, and that it does not extend to sales under common-law executions which issue by mere praecipe of the judgment creditor on the judgment, without order of the court, and in which the levy and sale of the marshal are ministerial, do not need confirmation to give them effect, and only come under judicial supervision on complaint of either party.

Taking up next the question of the validity of the levy which had been attacked because the procedure of the marshal was confessedly not in accordance with the *present* provisions of the law of the state in regard to levies on shares of capital stock, the Chief Justice said:

> Section 916 gives to the judgment creditor "similar remedies . . . by execution . . . as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court." . . . The law of Mississippi applicable to this subject matter, therefore, is the law which was in force at that date, unless the United States court for the northern district of Missouri has since adopted, by general rules, later state law. We are not advised that it has done so.

The law of Mississippi in 1872 as to levies on stocks was quoted and analyzed and compared with the present law of that state and it was held that the procedure was in substantial compliance with the law of 1872 and the levy valid.

On the question of the *place* of the sale as affecting its legality, the Chief Justice said:

> The chief objection of respondent is to the place of sale, which was at the western door of the United States courthouse for the western district of Mississippi, in the town of Oxford. Counsel for respondent contend that, under the Mississippi statute, the place of the sale should have been at the courthouse of Coahoma county, at Clarksdale, the county of the judgment debtor, and where the certificate of stock was levied on, and that the sale at the courthouse of the United States, where the judgment was entered and execution issued, was void.

The learned Chief Justice cited the statute of Mississippi on this point, reviewed the decisions of the supreme court, and showed that while in the case of the sale of *realty* strict compliance with the statute as to the place of sale was absolutely necessary, the rule was relaxed as to the sale of personalty, and said:

> With respect to goods and chattels, however, the sale at the place fixed by statute has not been regarded as so essential as compliance with the requirement that the officer selling them shall have the goods in view of the buyers . . . and yet, the authorities are divided on the question whether a departure from this requirement renders the sale of personalty void. . . .
>
> Section 914 requires that the proceedings in common-law cases in the Federal court shall conform to those of state courts "as near as may be." Section 916 gives the judgment creditor remedies on common-law executions "similar" to those of the state court. These qualifying words recognize the necessity for some play in adapting the state procedure to the practice of the Federal courts . . . It is but a reasonable and obvious consequence that the place of the proceedings generally shall be at the Federal courthouse instead of at the state courthouse. The inconvenience and danger of injustice to the judgment debtor in having his land sold at the Federal courthouse when it may lie at a great distance from there, in a remote county of the state, furnish strong reason why Federal and other courts should hold compliance with the injunction of the state laws as to the place of sale of *realty* indispensable to its validity. But in case of goods and chattels which, after seizure and levy, can be viewed by bidders as well at a Federal courthouse, as at a state courthouse, there is little ground for holding that such

sales, like other proceedings under its authority, may not be properly carried on at the place where the court sits. . . .

For reasons given, we hold that the sale of the 250 shares of stock to the Pacific Improvement Company vested a good title.

The decree of the Supreme Court of Mississippi was accordingly reversed and the cause remanded for further proceedings in conformity with the opinion.

The case was argued by Mr. H. D. Minor for the railroad and investment companies and by Mr. Gerald Fitz Gerald for the City of Clarksdale.

Interstate Commerce Commission.—(a) Judicial Review, Arbitrary or Unreasonable Order

Louisiana & Pine Bluff Railway Co. v. United States. Adv. Ops. p. 16.

The appellant railway company, owned by the Union Sawmill Company, serves it by a tap line which connects the mill with the Missouri Pacific Railway at Dollar Junction. The trunk line and the tap line joined in establishing joint rates from the mill to points on the trunk line and beyond. The large allowance of the joint rates given to the tap line was held by the Interstate Commerce Commission to amount to a rebate to the Union Sawmill Company and to discriminate against the Wisconsin Lumber Company, an independent concern also served by the tap line. After proceedings before the Commission which extended over many years (see the Tap Line Cases, 23 I. C. R. 277, 549, 31 id 490, 34 id 116, 40 id 470 and 53 id 475) a supplemental order of that body limited the division which the tap line might receive for hauling lumber from the Union Sawmills to Dollar Junction to $3 per car. The railway company then brought this suit against the United States in the Federal District Court for Western Arkansas to enjoin the enforcement of the order on the ground that it deprived plaintiff of property without due process of law, was discriminatory and beyond the authority of the commission. The district court on the hearing dismissed the bill and the case came to the Supreme Court by appeal.

Mr. Justice Brandeis delivered the opinion of the court. After reviewing the facts of the case and disposing of preliminary questions of practice the learned justice said:

> The contention that the order is invalid ignores both the nature of the proceeding before the Commission and the findings upon which the order was made. The proceeding was one to remove unjust discrimination. The Commission's decision is based upon a consideration both of general conditions and of the particular situation. It finds that allowance of more than $3 a car for hauling the car from the Union Sawmill plant to Dollar Junction would result in unjust discrimination. That the finding was supported by evidence we must assume in this proceeding. And not only does plaintiff fail to show that the conclusion reached was arbitrary; but additional findings in the report afford abundant reason why the out-of-line haul to the scales should not be allowed for in fixing the division. The Commission finds (53 Inters. Com. Rep. 475, 476) that "the evidence does not show that it is necessary that the shipments be weighed by the tap line rather than by the trunk line"; and (40 Inters. Com. Rep. 470, 471) that allowing the larger division on these facts would place the plaintiff in a more advantageous position than any other tap line in that territory performing a similar service, and would "open the way, ill the case of many tap lines, for a relocation of their track scales so as to require a long back haul, and in that way to lay a basis for divisions or allowances very materially in excess of those fixed by the Commission for the distance covered by a direct movement from the mill to the junction." In other words, divisions that would operate as rebates.

The judgment of the district court was accordingly affirmed.

The case was argued by Mr. Luther M. Walter for the railway company, by Special Assistant Attorney General Esterline for the Government and by Mr. W. R. McFarland for the Interstate Commerce Commission.

Interstate Commerce Commission.—(b) Enforcement of Decisions, Effect of Use of Wrong Method of Computation

Pennsylvania Railroad Co. v. Weber. Adv. Ops. p. 27.

This is the third appearance of the same important and protracted controversy in the highest court of the land. The history of the previous litigation can be found in 242 U. S. p. 89.

The action is based on a reparation order of the Interstate Commerce Commission finding that the defendant railroad by its allotment of cars to other companies and its sale of cars in time of car-shortage had discriminated against plaintiff and given preferential treatment to its competitors. The Commission computed the plaintiff's damages at $21,094.35 with interest since January 28, 1907, and attached to its report a table (known as Exhibit 10) which set forth the method of calculation employed by the Commission both as to discrimination and resulting damages. On the prior trial of a suit brought to enforce this report and award the defendant produced a witness who testified that the method of calculation employed by the Commission in Exhibit 10 was erroneous but the trial court refused to submit to the jury the question of the correctness of the table or to instruct them on that issue and a judgment was entered for the full amount of the award, the judgment was approved by the circuit court of appeals, third circuit, and reversed and remanded by the Supreme court.

At the last trial the report of the Commission and all the testimony before that body were introduced in evidence and the plaintiff produced also additional evidence on the question of discrimination, and the trial court charged the jury that the plaintiff might recover if the discrimination alleged and proved resulted in damages in the sum awarded by the commission, but that if Exhibit 10 was computed on a wrong basis (explaining that issue fully) the finding of the Commission would lose its effect as prima facie evidence and that they would be justified in finding a verdict for the plaintiff only if they should find from other evidence than Exhibit 10 proof of discrimination and damage. The charge fully explained to the jury the rules of law which should guide them in arriving at their own conclusion and computation if Exhibit 10 were found by them to be erroneous. A verdict was entered for the full amount claimed, a judgment on the verdict was affirmed by the circuit court of appeals and the case came again before the Supreme court on writ of error.

Mr. Justice Day delivered the opinion of the court. In less than two pages he marshals the history of this protracted and complex litigation and on the controlling question of the case the learned justice said:

> As there was substantial testimony in the record to support the finding of the Commission in awarding damages in a sum at least equal to the amount assessed by it, the principal question to be decided is: May a plaintiff recover in such circumstances in a suit based upon a repa-

ration order of the Interstate Commerce Commission when there is testimony fairly tending to show that recovery was justified because of unfair practices in the distribution of coal cars in times of shortage, which practices, as its report shows, were condemned by the Commission, although it may appear that the sum awarded by the Commission was actually based upon an erroneous calculation? . . .

That the Commission used a wrong basis in awarding damages, now that the whole record is before us, admits of no doubt. Indeed, the coincidence in the award made and the use of the percentage table shown in Exhibit No. 10, is difficult to account for except upon the basis pointed out by the witness introduced by the defendant, whose testimony was made the basis of the request to charge, the refusal of which led to the reversal of the judgment in 242 U. S., supra. . . .

On the other hand, there is testimony tending to show that, had the cars been distributed upon a basis of general equality approved by the Commission, and without resort to practices condemned by it, there would have been cars enough to have furnished plaintiffs with a sufficient number to meet their trade and requirements during the period in question. Under the circumstances here shown, when the case is fairly and fully submitted, as it was in the charge of the judge to the jury, giving a correct basis upon which there might be a recovery of damages, and there is testimony tending to show damages in at least the sum awarded by the Commission, there is no prejudicial error because of the erroneous calculation of the Commission which was the basis of its award.

The judgment of the circuit court of appeals was affirmed.

The case was argued by Mr. Henry Wolf Bicklé for the railroad and by Mr. William A. Glasgow Jr. for the shipper.

Interstate Commerce. (c)—Interference with, Restriction of Manufacture

Crescent Cotton Oil Co. v. State of Mississippi, Adv. Ops. p. 55.

A statute of the legislature of Mississippi prohibits corporations, whether organized under the laws of that state, or authorized under laws thereof to do business therein, from owning or operating any cotton gin, when such corporation is interested in the manufacture of cotton seed oil or cotton seed meal.

Plaintiff in error, a Tennessee corporation, prior to the passage of said act, owned and operated a cotton seed oil mill at Memphis and two cotton gins in Mississippi. Disregarding the "Anti-Gin Act," it continued to operate its two gins in Mississippi, and the state instituted a suit in equity in a county court which resulted in a decree that the act was constitutional and that the company was guilty of violating it. Drastic penalties were imposed, its rights to do intra-state business in Mississippi declared forfeited, the operation of its gins enjoined and ordered disposed of within ninety days.

The decree was affirmed by the supreme court of the state and the case brought to the Federal Supreme Court for review by writ of error.

Mr. Justice Clarke delivered the opinion of the court, and stated the main points of attack upon the constitutionality of the statute, and the conclusions of the court on those points, as follows:

The plaintiff in error . . . here relies, for its defense, upon the unconstitutionality of the Anti-gin Act, which it asserts upon two grounds, viz: first, that, as applied to the plaintiff in error, it imposes a direct and substantial, and therefore an unconstitutional, burden upon an instrumentality of interstate commerce; and, second, mildly, that, the act being applicable to corporations, and not to individuals, owning and operating cotton gins, it denies to the plaintiff in error the equal protection of the laws, and therefore offends against the Constitution of the United States. . . .

The separation of the seed from the fiber of the cotton, which is accomplished by the use of the cotton gin, is a short but important step in the manufacture of both the seed and the fiber into useful articles of commerce, but that manufacture is not commerce was held in Kidd v. Pearson, 128 U. S. 1, 20, (and other cases cited)...And the fact, of itself, that an article when in the process of manufacture is intended for export to another state does not render it an article of interstate commerce. . . . When the ginning is completed, the operator of the gin is free to purchase the seed or not; and, if it is purchased, to store it in Mississippi indefinitely, or to sell or use it in that state, or to ship it out of the state for use in another; and, under the cases cited, it is only in this last case, and after the seed has been committed to a carrier for interstate transport, that it passes from the regulatory power of the state into interstate commerce and under the national power.

The application of these conclusions of law to the manufacturing operations of the cotton gins, which we have seen precede but are not a part of interstate commerce, renders it quite impossible to consider them an instrumentality of such commerce, which is burdened by the Anti-gin Act, and the first contention of the plaintiff in error must be denied.

In relation to the second point the learned Justice said:

Where, as we have found in this case, a foreign corporation has no Federal right to continue to do business in a state, and where, as here, no contract right is involved, and there is no employment by the Federal government, it is the settled law that a state may impose conditions, in its discretion, upon the right of such a corporation to do business within the state, even to the extent of excluding it altogether. . . . And in such case the inherent difference between corporations and natural persons is sufficient to sustain a classification making restrictions applicable to corporations only. (Citing many cases.)

This would be sufficient to dispose of this second contention, but we may add that the law assailed was enacted by the state in the exercise of its police power, to prevent a practice conceived to be promotive of monopoly, with its attendant evils. It is clearly settled that any classification adopted by a state in the exercise of this power which has a reasonable basis, and is therefore not arbitrary, will be sustained against an attack based upon the equal protection of the laws clause of the 14th Amendment, and also that every state of facts sufficient to sustain such classification which can be reasonably conceived of as having existed when the law was enacted will be assumed. . . .

The record before us shows that before the law assailed was enacted, cotton gins had been operated in Mississippi by individuals as well as by corporations, but there is no showing that oil mills and cotton gins were both operated by an individual or by groups of individuals, and we think it may well be assumed, under the rule stated, that because of the larger capital required, and perhaps for other reasons, oil mills and cotton gins may have been operated in that state only by corporations, and that for this reason the restraint of the evil aimed at by the act of the legislature could be accomplished by controlling corporations only. Assuming this to be the fact when the law was enacted, obviously the classification objected to cannot be pronounced so without reasonable basis as to be arbitrary.

The judgment of the Supreme Court of Mississippi was affirmed.

The case was argued by Mr. J. B. Harris for the oil company and by Mr. Frank Roberson, Attorney General of Mississippi.

Local Improvements.—Special Assessments, Due Process

Breiholz v. Supervisors Pocahontas County, Adv. Ops., p. 12.

Conformably to the statutes of Iowa a system of drainage was adopted and constructed and an assessment to pay for this improvement was regularly levied on the lands within the district in proportion to the

benefits which each tract would derive from it. No question was raised as to the validity and regularity of its original assessment.

Two years later parts of the ditches became so filled up as to impair the usefulness of the system and the county board of supervisors adopted a resolution declaring that it was expedient that the drainage improvements should be "reopened, cleaned and otherwise repaired." A contract was let to do this work and assessment to pay for the cost thereof was made upon the lands in the district in the same proportion as that made to pay for the original construction.

This action was taken under a statute of Iowa which provides that after any drainage district shall have been established and the improvement constructed,

> "It shall be the duty of the board to keep the same in repair, and for that purpose they may cause the same to be enlarged, reopened, deepened, widened, straightened, or lengthened for a better outlet. . . . The cost of such repairs or change shall be paid by the board from the drainage fund of said . . . drainage district or by assessing and levying the cost of such change or repair upon the lands in the same proportion that the original expenses and cost of construction were levied and assessed, except where additional right of way is required or additional lands affected thereby, in either of which cases the board shall proceed," giving notice and hearing as is otherwise provided.

The above quoted section of the statute contained no provision for notice to the land owners of such intended enlargement, reopening and repairs, nor for any hearing at which objection might be made either to the doing of the work or to the assessment to pay for it, and plaintiffs in error contended that the failure to provide for such notice and hearing rendered the section unconstitutional for the reason that if enforced it would deprive them of their property without due process of law.

The Supreme Court of Iowa held the statute and assessment both valid and the case was reviewed by writ of error.

Mr. Justice Clarke delivered the opinion of the court and said:

> The provision of the section assailed, that the cost of repairs shall be assessed upon the lands of the district in the same proportion that the original cost was assessed, since it only requires a simple calculation to determine the amount of each assessment when the cost of the improvement is once determined, is a legislative declaration that the lands will be benefitted; and that, in such case, notice and hearing before such a legislative determination are not necessary, is settled by many decisions of this court (citing cases).
>
> The only possible source of objection remaining is the committing to the board of supervisors the power to determine, without notice and hearing, when repairs are necessary and the extent of them. But these are details of state administration with which the Federal authority will not interfere, except, possibly, to prevent confiscation or spoliation, of which there is no suggestion in this case.

The opinion of the Supreme Court of Iowa was quoted with approval as follows:

> "The duty (to keep the drainage system open and in repair) is one which is continuous, calling for supervision from day to day, and month to month, or, in the language of the statute, 'at all times.' The work to be done may involve considerable expense or it may be a succession of petty repairs, each of which is comparatively inexpensive. To require that in each case the board must advertise the job and seek the lowest bidder (and hold hearings with respect to it) would be to hamper and prevent its efficient action without any corresponding benefit to the public." (186 Iowa, 1147, 173, N. W. I.)

In answer to the further objection that the statute was unconstitutional because it might be and was used as authorizing a new improvement and a new taking without notice, the learned Justice said:

> It is not necessary that we should consider whether a case can be imagined in which the ditches of a district might be enlarged, deepened, widened, and lengthened to an extent such as to constitute a new construction and a new taking of property, which would require a further notice and hearing before a new assessment for it could be constitutionally imposed, for we have no such case here. There was some widening of the ditches for the purpose of securing a better angle of repose for the sides, and some slight widening and deepening of the bottom at various points, for the purpose of getting a better fall and outlet for the water, but we quite agree with the two state courts that the changes made were of a character and extent fairly within the scope of a cleaning, alteration, and repair of the ditch system, and necessary to promote its usefulness.

The judgment of the Supreme Court of Iowa was affirmed. The case was argued by Mr. Denis M. Kelleher for plaintiff in error and by Messrs. F. C. Gilchrist and Robert Healy for the taxing authorities.

Municipal Corporations—Power to Own and Operate Public Utilities and Fix Rates

Springfield Gas & Electric Co. v. City of Springfield, Adv. Ops. p. 38.

The company filed its bill to enjoin the city from producing and selling electricity to private consumers without first filing schedules of rates and printing and posting the same as required by Secs. 33 and 34 of the Illinois Public Utilities Act. The bill was dismissed on demurrer by the court of first instance. An appeal was taken to the Supreme Court of Illinois, where the decree was first reversed and then on rehearing affirmed. The Public Utility Act and the Municipal Ownership Act were enacted by the Illinois General Assembly within a few days of each other and, according to the supreme court of the state, as parts of a single plan. The former exempts cities from its operation and the latter authorizes cities to own and operate public utilities, and to fix rates, which in the case of other public utility corporations are subject to the approval of the state public utility commission. The plaintiff company contended the exception of municipal corporations from the Public Utility Act is void under the 14th Amendment and that the act should be enforced as if the exemption were not there.

Mr. Justice Holmes delivered the opinion of the court and said:

> It might, perhaps, be a sufficient answer to the plaintiff's case that the supreme court has intimated, after careful consideration, that the Utilities Act must stand or fall as a whole, so that, if the plaintiff's attack upon the exception were sustained, the whole statute would be inoperative and the only ground of the suit would fail. The plaintiff attempts to reargue the question, but upon this point the decision of the state court would be final and would control. However, as the supreme court did not stop at that point, but, assuming that, under the law of Illinois, the plaintiff had a standing to demand the relief sought if its case was otherwise good, went on to decide the validity of the exception, we think it proper to follow the same course, and to deal with the constitutional question raised.

Taking up the main question the learned Justice said:

> The plaintiff's argument, shortly stated, is that, in selling electricity, the city stands like any other party engaged in a commercial enterprise, and that to leave it free in the matter of charges while the plaintiff is subject to the public utilities board is to deny to the plaintiff the equal protection of the laws. But we agree with the supreme court of the state that the difference between the two types of corporation warrants the different treatment that they have received.
>
> The private corporation, whatever its public duties, is organized for private ends, and may be presumed to intend

to make whatever profit the business will allow. The municipal corporation is allowed to go into the business only on the theory that thereby the public welfare will be subserved. So far as gain is an object, it is a gain to a public body, and must be used for public ends. Those who manage the work cannot lawfully make private profit their aim, as the plaintiff's directors not only may but must.

On the question of the power of the municipal corporation to fix rates there was no challenge of the right of the legislature to authorize city councils to fix rates, but it was urged that since the city owned the plant in question, the city officers were disqualified by interest from the fixing of its own rates, at least while the rates of competing plants were submitted to the judgment of strangers. In reply to this contention the learned Justice declared:

But a city council has no such interest in the city's electric plant as to make it incompetent to fix the rates. Whatever the value of the distinction between the private and public functions of the municipality, the duty of its governing board in this respect, as we have said, is public and narrowly fixed by the act. The conduct of which the plaintiff complains is not extortion, but, on the contrary, charging rates that draw the plaintiff's customers away. . . . The trouble with the plaintiff's argument is that it attempts to go behind the interpretation that the supreme court has given to the acts concerned, and to overwork the delicate distinction between the private and public capacities of municipal corporations. It is unnecessary to refer to the numerous cases upon classification by state laws in order to show that the distinction in question here is very far from being so arbitrary that we can pronounce it bad.

The decree of the Supreme Court of Illinois was therefore affirmed.

The case was argued by Messrs. Philip Barton Warren and Joseph S. Clark for the company and by Mr. Bayard Lacey Catron for the city.

Patents—Validity and Infringement

Hildreth vs. Mastoras, Adv. op. p. 50.

This case was before the Supreme Court on a writ of Certiorari to the Circuit Court of Appeals in the Ninth Circuit.

The District Court of Oregon held the Dickinson patent No. 831,501 for a candy pulling machine valid and infringed and granted an injunction. On appeal, the Circuit Court of Appeals for the Ninth Circuit reversed the decree of the District Court and held the claim of the patent to be so limited by a prior patent as not to cover the defendant's device made under a subsequent patent.

Previously the Circuit Court of Appeals for the Fourth Circuit had held the Dickinson patent valid and infringed.

While the patent was pending in the Patent Office an interference was declared between six applications. The controversy was strenuously contested and carried to the Court of Appeals of the District of Columbia where the Dickinson invention was treated as a primary or generic one. The controversy involved, among other issues that of the operatives of the Dickinson device. Mr. Chief Justice Taft delivered the opinion of the court.

The opinion refers to the advancement of candy pulling machines over the old method of pulling candy by hand which has revolutionized the art of candy making. Respondent, Mastoras, was for some time a licensee of petitioner Hildreth until he made and used his present machine.

It appears in the opinion that the Dickinson structure was the first practical machine. On this point the Chief Justice said:

The Firchau device never, so far as appears in the record, made candy experimentally or otherwise. Indeed, no candy was commercially pulled by machine before or after the issuing of the Firchau patent in 1893 until the introduction of the Dickinson principle, nine or ten years later. . . . .

The history of the art shows that Dickinson took the important but long-delayed and therefore not obvious step from the pulling of candy by two hands, guided by a human mind and will, to the performance of the same function by machine. The ultimate effect of this step, with the mechanical or patentable improvements of his device, was to make candy-pulling more sanitary, to reduce its cost to one-tenth of what it had been before him, and to enlarge the field of the art. He was, therefore, a pioneer.

As to the contention that the Dickinson machine was inoperable,—a conclusion forming in part the basis of the decision of the Ninth Circuit of the Court of Appeals, the court disagreed with the Circuit Court and sustained the finding of the District Judge who had the working model and the witnesses before him. Specifically the court declares:

It is not necessary, in order to sustain a generic patent, to show that the device is a commercial success. The machine patented may be imperfect in its operation; but if it embodies the generic principle and works, that is, if it actually and mechanically performs, though only in a crude way, the important function by which it makes the substantial change claimed for it in the art, it is enough.

Passing to the question of infringement, the learned Chief Justice observed that every demand of the first claim of the patent in suit can be traced in the Langer machine used by defendant; the arrangement of one element of the Langer device being better than Dickinson's, but the principle of the operation being the same.

Counsel for respondent urged that the trough for holding the candy was a necessary element of the patented structure and that no trough is shown in respondent's device. But the court directs attention to the specification of the Dickinson patent wherein the patentee says he shows a trough for supporting the candy, but any suitable support may be used. Two of the machines which were in interference in the Patent Office with petitioner's patentee had pins set in a horizontal instead of an upright position and thus the candy needed no trough support but rested on the pins themselves.

As to the effect of this, it is stated:

Doubtless this was an improvement which was perhaps patentable, but none of the tribunals in the Patent Office proceedings deemed this to be more than an improved equivalent of the trough which did not take these machines out of the domination of the claims awarded to Dickinson. As the Dickinson patent is a generic patent, the doctrine of broad equivalents properly applies here.

The judgment of the Circuit Court of Appeals was reversed and that of the District Court affirmed.

The case was argued for Hildreth by Mr. Frederick D. McKenney and Mr. George P. Dike, and for the respondent by Mr. Joseph L. Atkins, and W. A. Robbins.

Practice.—Removal, Separable Controversy, Fraudulent Joinder

Wilson v. Republic Iron & Steel Co., et al. Adv. Ops. p. 22.

This was an action brought in an Alabama state court by an employee against his employer and a co-employee to recover for injuries sustained by reason of his compliance with an order alleged to have been negligently given to him by a co-employee. The employer's liability was based on an Alabama statute and that

of the co-employee on the common law. The complaint contained a single count and charged the defendants with joint negligence.

The employer, a New Jersey corporation, filed a petition to remove the cause to the Federal court on the ground that the co-employee, a resident of Alabama, was joined as defendant for the fraudulent purpose of preventing removal of the cause to the federal court, that the employee had previously sued the employer in the district court and had taken a voluntary nonsuit because it appeared on the trial that, on the evidence then presented he was likely to receive an adverse decision.

Shortly after the removal the plaintiff filed in the district court a motion to remand. This motion challenged the jurisdiction of the district court on the grounds that one of the defendants, the co-employee, was a citizen of the same state as the plaintiff, and that the removal was taken for delay, but the plaintiff did not traverse or take issue with any of the allegations of the petition for removal. The motion to remand was heard and denied. The employer then moved for an order requiring the plaintiff within a fixed time to pay the costs in the prior action brought by him in the district court and there dismissed on his motion, and on the expiration of the time fixed and the refusal of the plaintiff to pay the costs in the other suit, this suit was dismissed.

To review the jurisdictional question raised by the motion to remand, the plaintiff sought and obtained a direct writ of error in section 238 of the Judicial Code, and the district court certified that the jurisdictional question involved was whether in the circumstance above set forth, it had jurisdiction to retain the cause and proceed to a determination thereof or was required to remand the same to the state court.

Mr. Justice Van Devanter delivered the opinion of the court. On the main question involved he said:

> A civil case, at law or in equity, presenting a controversy between citizens of different states, and involving the requisite jurisdictional amount, is one which may be removed from a state court into the district court of the United States by the defendant, if not a resident of the state in which the case is brought (Sec. 28, Jud. Code); and this right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy. . . . If, in such a case, a resident defendant is joined, the joinder, although fair upon its face, may be shown by a petition for removal to be only a sham or fraudulent device to prevent a removal; but the showing must consist of a statement of facts rightly leading to that conclusion, apart from the pleader's deductions.

The learned justice discussed the rules governing the procedure in such cases emphasizing the rule which required the plaintiff to traverse the allegations of the petition for removal if he desires to controvert the same, and said:

> Here, but for the joinder of the co-employee, the case plainly was one which the employer was entitled to have removed into the district court on the ground of diverse citizenship; and, if the showing in the petition for removal be taken as true, it is apparent that the co-employee was joined as a defendant without any purpose to prosecute the action in good faith as against him, and with the purpose of fraudulently defeating the employer's right of removal. This is the rational conclusion from the facts appropriately stated, apart from the pleader's deductions. The petition was properly verified, and the plaintiff, although free to take issue with its statements, did not do so. He therefore was to be taken as assenting to their truth, relieving the employer from adducing evidence to sustain them, and merely challenging their sufficiency in point of law. We hold they were sufficient, in that they disclosed that the joinder was a sham and fraudulent, and hence was not a legal obstacle to the removal or to the retention of the cause by the district court.

The judgment of the district court was accordingly affirmed.

The case was argued by Mr. W. A. Denson for the employer and by Mr. Augustus Benners for the employee.

It will be observed that the consideration of two interesting questions was precluded by the fact that the case was taken to the Supreme court direct on the jurisdictional question only. If the whole case had been taken to the circuit court of appeals, that court would have had power to decide those questions namely, (1) Can a common law liability of one defendant and a statutory liability of another be pleaded together in a single count? (2) Is it proper to dismiss a suit merely because the plaintiff in that suit refuses to pay the costs in another suit? The first question is not important or difficult but the second involves the application of some fundamental principles. Is the right of a plaintiff to demand the aid of a judicial tribunal an absolute or qualified right and if so what are the limitations on its exercise? Of course he may be denied the exercise of that right if he refuses to pay the costs of the particular proceeding, but if he pays all the costs and complies with all the rules of court in one case can his right to maintain that suit be taken away merely because he has not paid the costs of suit in another suit in the same court between the same parties?

Taxation.—Stock Exchange Membership

Anderson v. Durr, et al. Adv. Ops. p. 18.

Anderson, a resident of Hamilton County, Ohio, owned a membership in the New York Stock Exchange for which he paid $60,000 and which carries valuable privileges and has a market value. The exchange holds the beneficial ownership of all the capital stock of a New York corporation which owns the building in which the business is conducted and the land on which it is located, worth more than $5,000,000. A property tax was imposed on Anderson, under authority of an Ohio statute, by reason of his ownership of such membership. He filed a bill in a state court to enjoin the enforcement of such tax on the ground that it infringed his rights under the Commerce clause of the Federal Constitution and under the "due process" and "equal protection of the law" provisions of the 14th Amendment.

His assault upon the tax was sustained by the court of first instance, but overruled by the Court of Appeals and finally by the Supreme Court of the State.

Mr. Justice Pitney delivered the opinion of the court; and after reviewing the course of the litigation below and the facts involved and holding that certiorari and not writ of error was the proper method for review, said:

> That a membership held by a resident of the state of Ohio in the Exchange is a valuable property right, intangible in its nature, but of so substantial a character as to be a proper subject of property taxation, is too plain for discussion. That such a membership, although partaking of the nature of a personal privilege, and assignable only with qualifications, is property within the meaning of the Bankrupt Laws, has repeatedly been held by this court. (Citing cases.) Whether it is subjected to taxation by the taxing laws of Ohio is a question of state law, answered in the affirmative by the court of last resort of that state, by whose decision upon this point we are controlled. . . .
>
> The chief contention here is based upon the due process of law provision of the 14th Amendment; it being insisted that the privilege of membership in the Exchange

is so inseparably connected with specific real estate in New York that its taxable situs must be regarded as not within the jurisdiction of the state of Ohio. . . . It is very clear, however, as the supreme court held, that the valuable privilege of such membership is not confined to the real estate of the Stock Exchange; that a member has a contractual right to have the association conducted in accordance wih its rules and regulations, and, incidentally, has the right to deal through other members on certain fixed percentages and methods of division of commissions; that this right to secure the services of other members and to "split commissions" is a valuable right by which plaintiff in Cincinnati may properly hold himself out as a member entitled to the privileges of the Exchange, denied to nonmembers; and that thus he is enabled to conduct from and in his Cincinnati office a lucrative business through other members in New York. The court held, and was warranted in holding, that the membership is personal property, and, being without fixed situs, has a taxable situs at the domicile of the owner. Mobilia sequuntur personam. . . .

Nor is plaintiff's case stronger if we assume that the membership privileges exercisable locally in New York enable that state to tax them even as against a resident of Ohio. . . . Exemption from double taxation by one and the same state is not guaranteed by the 14th Amendment, . . . much less is taxation by two states upon identical or closely related property interests falling within the jurisdiction of both forbidden. (Citing cases.)

The argument is that other brokers in the same city are not taxed upon the value of their memberships in the local stock exchange, nor upon the privilege of doing business in New York Stock Exchange securities. As to the local exchange memberships, it may be that the failure to tax them is but accidental, or due to some negligence of subordinate officers, and is not properly to be regarded as the act of the state. If it be state action, there is a presumption that some fair reason exists to support the exemption, not applicable to a membership in the New York Exchange, and plaintiff has shown nothing to overcome the presumption. As to the privilege referred to, it already has been shown that the rights incident to plaintiff's property interest give him pecuniary advantages over others in the same business. Manifestly this furnishes a reasonable ground for taxing him upon the property right, although others enjoying lesser privileges because of not having it may remain untaxed. . . .

Ordinary property taxation imposed upon property employed in interstate commerce does not amount to an unconstitutional burden upon the commerce itself.

The judgment of the Supreme Court of Ohio was accordingly affirmed.

Mr. Justice Holmes, avoiding an express statement of dissent, said:

The question whether a seat in the New York Stock Exchange is taxable in Ohio consistently with the principles established by this court seems to me more difficult than it does to my brethren. All rights are intangible personal relations between the subject and the object of them created by law. But it is established that it is not enough that the subject, the owner of the right, is within the power of the taxing state. He cannot be taxed for land situated elsewhere, and the same is true of personal property permanently out of the jurisdiction. It does not matter, I take it, whether the interest is legal or equitable, or what the machinery by which it is reached, but the question is whether the object of the right is so local in its foundation and prime meaning that it should stand like an interest in land. If left to myself I should have thought that the foundation and substance of the plaintiff's right was the right of himself and his associates personally to enter the New York Stock Exchange building and to do business there. I should have thought that all the rest was incidental to that, and that that, on its face, was localized in New York. If so, it does not matter whether it is real or personal property, or that it adds to the owner's credit and facilities in Ohio. The same would be true of a great estate in New York land.

As my Brothers Van Devanter and McReynolds share the same doubts, it has seemed to us proper that they should be expressed.

The case was argued by Mr. Murray Seasongood for plaintiff in error and by Mr. Charles S. Bell for the Ohio taxing authorities.

The Louisiana Constitution of 1921

THE most important new matters in the Constitution of 1921 relate to the reorganization of the courts, provision for education, the creation of a good road system, and suffrage.

The Louisiana constitution of 1898 contained a "grandfather" clause. This clause was revised by an amendment to the constitution in 1912, and the effect of the clause was limited to September 1, 1913. The constitution of 1913 contained no "grandfather" clause, and this omission was probably due to litigation then in progress with respect to the constitutionality of such clauses. It did, however, contain a provision permitting persons to register and vote who were unable to read and write, if they owned property of the value of $300. The Supreme Court of the United States in the cases of *Guinn* v. *U. S.* and *Myers* v. *Anderson* (238 U. S. 347, 368) in 1915 held "grandfather" clauses unconstitutional in the Oklahoma constitution and in Maryland legislation. The constitution of 1921 omits a "grandfather" clause, but borrows from the neighboring state of Mississippi by providing that a person may be entitled to register even though he cannot read and write, if he "shall be able to understand and give a reasonable interpretation of any section of either constitution when read to him by the registrar, and he must be well disposed to the good order and happiness of the state of Louisiana and of the United States, and must understand the duties and obligations of citizenship under a republican form of government." The constitution also contains conditions regarding residence, registration, good character, and proof of payment of a poll tax for two preceding years, which will accomplish the purposes aimed at by the provisions previously in the constitution, even though the "grandfather" clause has disappeared.

The judicial system of the state is reorganized. The Supreme Court is enlarged and permitted to sit in divisions, and is given supervisory powers over inferior courts. Provision is made for the massing of judges when the burden of work becomes too great for any one of the higher courts. The attorney general's office is created a state department of justice with some measure of control over district attorneys and their work.

Detailed provisions are made for education. The entire educational system is centralized under the control of the state board of education and the state superintendent is made elective by that board.

A highway fund is created by providing for a license tax on motor vehicles and for a tax on gasoline; this fund to be expended under the supervision of the board of state engineers, for the construction and maintenance of hard surface roads.

There are numerous other changes in detail from previous constitutions, and the new Louisiana constitution may be said to indicate to some extent the present tendencies with respect to a better organization of the judicial system and with respect to the simplification of government in general. However, the new constitution does not go very far in these directions. A more detailed analysis of the new constitution will be found in a note by Clarence A. Berdahl, in the American Political Science Review for November, 1921 (Vol. XV, No. 4, page 565).

INTERESTING MANUSCRIPTS GIVEN TO CONGRESSIONAL LIBRARY

Justice Holmes Presents Originals of Dr. Holmes' Correspondence—Manuscript of Grant's Memoirs—Collection of Justice John McLean Papers Completed—Henry Watterson Letters

THE annual report of the Librarian of Congress for 1921 gives a good idea of the wealth of original manuscripts and of valuable source material for the student and historian that is being gathered together by that institution. The following extracts will prove interesting to the legal profession:

"Dr. Oliver Wendell Holmes, possessed of a genius for friendship, had a multitude of correspondents, who wrote to him freely and often at length. These letters, some 500 in number, have been given to the Library by his son, Mr. Justice Holmes, of the Supreme Court of the United States. A selection from them has been placed on exhibition. Dr. Holmes, as a member of the Atlantic Monthly group, was in intimate and familiar correspondence with Lowell, Longfellow, Whittier, Aldrich, Mrs. Stowe, and Charles Eliot Norton. He was in touch also with Edgar Allan Poe; with Francis Bowen, the economist and philosopher; Benjamin Pierce, the mathematician; the historians, Bancroft and Prescott; President Hayes, Charles Francis Adams, Samuel L. Clemens, William H. Herndon, Phillips Brooks, and P. T. Barnum. His foreign correspondents included Robert Browning, Charles Dickens, Wilkie Collins, Matthew Arnold, Sir Edwin Arnold, Edmund Gosse, Henry Irving, and Ellen Terry. The Holmes correspondence is a valued addition to the literary treasures of the division. Mr. Justice Holmes has given also a broadside, "The Great International Walking Match," signed by George Dolby, James R. Osgood, James T. Fields, Jr., Charles Dickens, and A. V. S. Anthony, an amusing reminiscence of the Dickens visit of 1865. Also a letter written by Lafayette to his grandfather, Dr. A. B. Holmes, in 1828.

"Mr. Justice Holmes supplemented his former gifts by bestowing on the Library seven volumes of manuscripts of Dr. Holmes' writings, including The Poet at the Breakfast Table; Over the Teacups; A Mortal Antipathy; and Our Hundred Days; a volume of poems; the biography of Ralph Waldo Emerson; a volume of notes on Emerson; and the biography of John Lothrop Motley."

"Marshall McLean, Esq., of New York City, made a gift which virtually completes the collection of papers of Judge John McLean. These additional papers, covering the period 1840-1860, are legal documents, briefs, petitions, demurrers, decisions, and other papers, often accompanied by analyses of the cases and notes of the decisions rendered. There is miscellaneous correspondence, from 1838 to 1860; and Judge McLean's notes of arguments, 1818-1823, during his term on the Ohio Supreme Court bench."

"Mrs. Frederick Dent Grant and her son, Maj. U. S. Grant, 3d, U. S. A., have given to the Library the original manuscript of the Personal Memoirs of U. S. Grant. The manuscript is largely in the handwriting of Gen. Grant; it shows the changes in copy made by him, shows also the manner of composition, and is a revelation of his personality. The portion dictated is in the handwriting of his son, Gen. Frederick Dent Grant. This manuscript has been bound in nine folio volumes. The gift also includes a contemporary facsimile of Gen. Grant's Des Moines speech, September 29, 1875, on the relations between the North and the South, and his plea for non-sectarian education; likewise a pencil drawing of an Italian landscape, made and signed by Cadet U. H. (Hiram) Grant at West Point—evidently an exercise in copying, but done with neatness and exactness of detail. At the request of the same donors, President Harding promptly transferred to the Library four volumes containing longhand copies of letters and telegrams written in the White House during the eight years of President Grant's administration, beginning March 5, 1869, and ending March 3, 1877. These are the letter books adverted to in the Van Tyne-Leland Guide to Archives in Washington; but evidently the compilers had found but two of the four books, and regarded them as fragments rather than an inclusive record. These two gifts outline Grant's military and civil career. Each is a source of first importance to writers of the history of the War between the States. The obligation of the Library to the donors is beyond expression."

"Henry Watterson,[1] distinguished as journalist, orator, and writer, has been a leader of public opinion since he assumed the management of the Louisville Courier-Journal in 1868. A reasonable partisan, he has sustained amicable relations with almost every prominent public man during his long and active life. Even those who differed radically from him on matters in controversy were treated only as players in the game; no acrimonious personalities engendered bitterness. As a result, his correspondence includes letters from men of every political party and of none; from authors, divines, and men of affairs, writing on topics of the moment, and revealing their convictions with a delightful candor. Having published his autobiography and retired to the enjoyments of an alert-minded octogenarian, Mr. Watterson has placed in the Library his extensive correspondence, for the enlightenment of those who desire to know the springs that moved the Democratic party, especially during the momentous years of the Cleveland administration. To Mr. Watterson and to his secretary, Mr. G. E. Johnson, obligations are due for this prized gift."

1. Mr. Watterson died after this was written.

AMERICAN BAR ASSOCIATION JOVRNAL

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THE 1922 MEETING

In selecting San Francisco as the place for holding the 1922 sessions of the American Bar Association, the Executive Committee yielded to an insistent plea for recognition on the part of the Pacific states. The invitation had been in the making for more than a year. When it came to a head and was presented to the committee at their Tampa sessions this month, it was found that practically the whole bench and bar of seventeen states had joined in a unanimous petition to hold the sessions this year in California. Never before has the invitation of any city or state been supported by such a widespread and enthusiastic organization.

The foregoing circumstances, conjunctively with other solid considerations, made the decision of the Executive Committee inevitable. The western states present an inviting field for the enlistment of large additions to the membership rolls. There are 27,000 lawyers west of the Mississippi river. Less than 3,000 of them are members of the Association. California alone has a bar of 5,400 members. It is the sixth largest state bar in the Union, ranking next after Massachusetts. Given the assurance that the United States is not too big for the American Bar Association and that the Association is nation-wide in the scope of its activity, as is evidenced by the decision to meet in San Francisco, the western lawyers and their several state and local bar associations propose to inaugurate an aggressive campaign to increase the membership of the American Bar Association in those states. If the decision of the Executive Committee had been otherwise, and if the San Francisco invitation had been declined, it would have spelled discouragement to all members of the Association residing in that vast section of the country. These members say they are willing to come east to annual sessions nine years out of ten. But they justly feel that once a decade the sessions should be held on the Pacific Coast. Furthermore, it is urged that this is a "Pacific" year. The attention of the country is largely concentrated on our interests in "the regions of the Pacific." In going to the metropolitan center of our Pacific Coast this year, the American Bar Association declares that it has no secondary interest in the vital issues that concern the general welfare of the nation.

THE WASHINGTON CONFERENCE

The rapid pace which marked the earlier stages of the conference on the limitation of armaments has seemed to slacken. France has withheld concurrence on the proposals for the limitation of submarine tonnage. Japan and China have not yet reached a full accord. Notwithstanding these facts, real progress has been made.

It has been agreed that the humane rules of International Law which have been evolved from the experience of the race through centuries of maritime warfare, and which forbid the sinking of merchantmen without notice and without insuring the safety of passengers and crews, shall be extended to submarines. This principle will undoubtedly be adopted in due course by the League of Nations and it will then be binding upon all the member nations and upon those who subsequently apply for admission to the League. Since Germany has clearly expressed its desire for admission and since its admission, after the adjustment of indemnities and guarantees, is a foregone conclusion, it is safe to say that this principle will soon become unquestioned International Law, founded on the common consent of all the civilized nations of the world.

The attitude of France in regard to limitations on its auxiliary craft and submarines is regrettable, but not by any means inexplicable. She is still vitally concerned in an unsolved problem of guarantees for peace and safety in the future. When this problem is solved her attitude will be radically changed and this change may come sooner than is expected.

Japan has exhibited a desire to unite with the other members of the Washington conference in composing the differences in

the Far East, and at the same time Japan, like France, is concerned as to the security of her future. She is thus shaken by a conflict of desires, but those who are impatient with the deliberations of Japan should not forget that she has given her assent in principle to every important part of the American program, and has uniformly followed this assent in principle by an express assent to the formula in many important matters. There is no particular in which the position of the United States and that of Japan have proved to be irreconcilable.

It is impossible to overemphasize the importance of the recent developments of the conference as to the "Open Door" and the abolition of "Spheres of influence" in China. Mr. Hughes' lucid restatement and clarification of this principle, and Mr. Balfour's suggestion of machinery to elucidate the facts concerning any question of compliance with the principle of equal opportunity, were accepted "in principle" by Japan with a request for time to study the text. France accepted the Hughes-Balfour resolution except as to pre-existing concessions. Every indication, therefore, points to the probability of an accord, and if there be a real accord among the parties to the Washington Conference as to the principle of equal opportunity in China, it will undoubtedly go far to help compose the differences between Japan and China and will be one of the greatest steps in the world's history towards the removal of causes of war.

A NEW DEPARTURE

There is no subject of greater importance to the lawyer than the maintenance of the high standards of professional ethics.

Even if this proposition be regarded from the viewpoint of self-interest, its truth is self evident. For the maintenance of enduring relationship between lawyer and client, trust and confidence are essential. When the client's confidence is impaired, he seeks other counsel. Confidence cannot continue if doubt exists as to the lawyer's fidelity to the fundamental rules which govern his duty to his client, to the court, and to the cause of justice.

But there is a larger viewpoint. The code of professional ethics ennobles the profession. The observance of this code makes the practice of law an avocation to which the right-minded man can enjoyably devote his life and his best energy even if the financial rewards are inadequate, compared with those that may be realized in other lines of effort.

The code of professional ethics must be universally observed. Unethical conduct by a few, whether because of ignorance or evil intent, injures all. Hence the necessity of special activity on the part of the organized bodies of the bar to uphold it and to punish infractions.

With these considerations in mind the Executive Committee has approved a report of the Special Committee heretofore appointed to prepare a plan defining the scope and power of the Standing Committee on Professional Ethics and Grievances. This report recommends an amendment to the by-laws of the American Bar Association, authorizing said committee to stimulate and promote in all the state and local bar associations the establishment of committees which shall function along the lines so successfully established by such committees in many of the larger centers of population.

The proposed amendment will also authorize the committee to answer questions concerning the application of the Canons of Ethics when consulted by officers or committees of state and local bar associations.

The limitation of this power to exercise only when invoked by bar associations and not by individuals seems conservative and wise. It protects the committee from imposition and from the burden of dealing with curious and insincere interrogations.

The plan also contemplates giving the committee jurisdiction to hear and act upon complaints against members of the American Bar Association for professional misconduct and to refer to appropriate state and local associations complaints against lawyers not members of the national organization.

The proposed amendment will be presented to the midwinter conference of Bar Association Delegates to be held in Washington February 23-24, and will doubtless there receive the attention which the importance of the subject merits.

CONTRIBUTIONS

The board of editors wish the members of the Association to feel that the JOURNAL is a forum in which every question of broad interest to the profession in general may be discussed. Articles and letters are welcomed and those who send them may be assured that they will receive prompt and careful attention.

THREE NEEDED STEPS OF PROGRESS

Increase in Number of Federal District Judges, Simplified Procedure in Federal Trial Courts, and Certain Changes in Supreme Court Jurisdiction Would Improve Administration of Justice*

By WILLIAM HOWARD TAFT
Chief Justice United States Supreme Court

I THANK the Bar Association of Chicago for giving me this welcome. When your President came to me to tender the honor, I hesitated to accept, because I doubted whether I had the right to take the time to come out here for this pleasure, but I justified yielding to the temptation by the plea that it is necessary in the proper administration of justice to maintain cordial relations between the Bench and the Bar. Conditions of mutual good will and mutual respect always make for better administration of justice, and therefore I have convinced myself that I ought to do what I want to do.

Now, what shall I talk about? In a meeting of the Bar, it is proper to talk shop. I would like to say something on three steps of progress which I hope may be taken in the near future to make the administration of justice in the Federal Courts more expeditious, and therefore more useful. In what I say, I speak for myself only and not for my colleagues. I presume it is a compliment to the Federal Courts for Congress and the people to seek to increase their jurisdiction. Whatever be the motive, it is certain that their jurisdiction has been vastly enlarged. Dormant powers of the Federal Government under the Constitution have been made active, and the Federal Government has poked its nose into a great many fields where it was not known before, for lack of Congressional initiation. In the first place, the giving to the Federal trial courts jurisdiction of suits involving federal questions without regard to citizenship was one addition. Then the enactment of the Interstate Commerce law and the casting upon Federal Courts the revisory power over the action of the Interstate Commerce Commission was another. Then, the Anti Trust Law, the Railroad Safety Appliance Law, the Adamson Law, the Federal Trade Commission Law, the Clayton Act, the Federal Employers' Liability Law, the Pure Food Law, the Narcotic Law, the White Slave Law and other acts, and finally the Eighteenth Amendment and the Volstead Act, have expanded the civil and criminal jurisdiction of the Federal Courts of first instance to such an extent that unless something is done, they are likely to be swamped, and delay is a denial of justice. Examination of the statistics of cases brought and tried and personal conference with judges leave no doubt that an increase of the judges of first instance in the Federal system is absolutely necessary. The existing arrangement of courts and districts in nine circuits is a matter of long standing. The arrangement has really been outgrown, and ought to be changed. But it is of such age, and the country has grown so used to it, that a re-arrangement would involve much discussion and arouse much opposition. If the needed increase of the judiciary were to be halted until that was settled, it would involve much delay and imperil immediate relief.

Two bills have been proposed to meet the necessity for an increase of judges. The House bill was introduced by Mr. Walsh of Massachusetts. In it provision is made for twenty-two new district judges who are assigned to some twenty districts where the statistics seem to show arrears. These are additions to the present district judges, and are to be given jurisdiction in a specified district and are to be appointed therefrom. A different system has been attempted in the Senate bill recommended by the Attorney General. The provision there made is for eighteen district judges at large, two to be appointed from each circuit, and to be subject to assignment to any district in the United States by the Chief Justice. The House bill has passed the House of Representatives. The Senate bill has been considered by a sub-committee of the Judiciary Committee and approved, but has been now assigned to a sub-committee to be considered in connection with the House bill which is now in the Judiciary Committee of the Senate. Objection is made to the appointment of district judges at large because the idea of roving judges is thought to have something undesirable in it. The district judges at large are a temporary provision to meet the emergency and they are distributed through the circuits with a view of massing them in the particular districts that most need additional judicial force. When their work is done, they can be given fixed districts.

It seems likely that the two bills will result in a compromise, that the number of district judges at large will be reduced to perhaps half the original number, and that the fixed district judges will also be reduced.

The bills are alike in what seems to me to be a most important new feature in the Federal Judiciary. Provision is made for annual or more frequent meetings at the call of the Chief Justice, of the senior circuit judges of the nine circuits, in Washington or some other convenient place, to take up the question from year to year of the arrears of business, and after conference to agree and recommend a plan, thereafter to be carried out in the discretion of those in authority, for the massing of the extra judicial force at strategic points, and thus overcoming the enemy known as "arrears in business."

You in Chicago have had your city courts under some such organization as this, and I understand that it has worked well. There is not the slightest reason why into judicial work we should not introduce some simple and primary principles of business dispatch. When we have too much

*Address at banquet in his honor given by Chicago Bar Association, Dec. 27, 1921.

work in one district and too little in another, we should use the judge whose work is done, to help out the man in the other district whose work is too heavy for him to get through. Judges should be independent in their judgments, but they should be subject to some executive direction as to the use of their services, and somebody should be made responsible for the whole business of the United States. This council of the Chief Justice and the senior circuit judges of the nine circuits is as well adapted to do this work as anybody that can be suggested. I think the country is thoroughly imbued with the idea that there must be some measures adopted, and that an increase in the judges is essential. So far as I can observe, both Houses are in accord as to the suggestion of some kind of executive administration with reference to putting the judges of the country where they can do the most good.

The second step that should be taken is a simplification of the procedure in all cases in the Federal trial courts. We still retain in those courts the distinction between suits at law, suits in equity and suits in admiralty. The Constitution refers specifically to them, and in deference to that separation in the Constitution, the distinction is preserved in the Federal practice. It seems to me that there is no reason why this distinction, so far as actual practice is concerned, should not be wholly abolished, and what are now suits in law, in equity and in admiralty, should not be conducted in the form of one civil action, just as is done in the code states. Of course it will be necessary in such a system to preserve the substantial differences in procedure and right which are insured by the Constitution and are of the utmost value in the administration of justice. Of course the right of jury trial secured by the Constitution in civil cases involving over $20 must be preserved and can be without difficulty, and can be reconciled with the right of a man under equity procedure to certain forms of more satisfactory remedy, preventive and otherwise. What can be done has been done in Great Britain, and the simplicity of the practice there reflects on the enterprise of lawyers on this side of the water. They have accomplished what they have done on that side by laying down certain general principles and then vesting the courts of justice with the power by rules to prescribe the details of the procedure. This is done now with us in courts of admiralty and courts of equity, in which the framing of the rules is entrusted to the Supreme Court. All that is needed is to vest the same power in the Supreme Court with reference to the rules at common law and then to give that court the power to blend them into a code, which shall make the procedure the same in all and as simple as possible.

The degree to which the English courts now go in helping a litigant to present the merits of his case without restriction is hardly understood here. The English courts are determined that no prejudice shall be suffered by any litigant through a technicality or a requirement as to pleading which the courts may relieve by amendment, and that is what we ought to have here. Objection has been made to allowing the Supreme Court to make the rules at common law in Federal trial courts because now the procedure in the state courts is followed in common law cases in the Federal courts. It is thought that to introduce a new system would make it awkward for lawyers and litigants used to a particular state procedure. This I conceive is not a sound objection, because the plan is to make the system so simple that it needs no special knowledge to master it. It is for the plaintiff to write a letter to the court and state his case, and if he has not amplified it enough to make the case, to give him the opportunity in the course of the proceeding to put in the facts which are lacking, if he can do so.

It is not a delegation of great power to the Supreme Court. The court in formulating the rules will of course consult a committee of the Bar and committee of the trial judges. Congress can lay down the fundamental principles that should govern and then the court can fill out the details. The procedure in the Federal Courts should be a model for all other courts. The administration of justice has been under attack and subjected to proper criticism. The legislatures have been largely to blame and not the judges engaged in carrying out what the legislatures have put into the statutes. Reforms of this character should begin in Congress and the state legislatures, and I am glad to say that I think Congress is ready to undertake the reform, if it be clearly outlined.

The third step to be taken is a change in the jurisdiction of the Supreme Court. In the first place, the jurisdiction of the Supreme Court is defined in a great many different statutes and special acts, and it has really become almost a trap to catch the unwary. Some of us are working on a proposed bill to simplify the statement of the jurisdiction of the Supreme Court and have it embraced in one statute.

The second and the moving cause of the proposed reform is the feeling that many have, that there must be some method adopted by which the cases brought before that Court shall be reduced in number, and yet the Court may retain full jurisdiction to pronounce the last word on every important issue under the Constitution and the statutes of the United States and on all important questions of general law with respect to which there is a lack of uniformity in the intermediate Federal courts of appeal. Much has already been done in this way by reducing the number of cases in which a writ of error or appeal in the Supreme Court is a matter of right, and by submitting other cases to the preliminary selection by the Court of those which it should hear. A Supreme Court where there are intermediate courts of appeal is not a tribunal constituted to secure, as its ultimate end, justice to the immediate parties. They have had all that they have a right to claim when they have had two courts in which to have adjudicated their controversy. The use of the Supreme Court is merely to maintain uniformity of decision for the various courts of appeal, to pass on constitutional and other important questions for the purpose of making the law clearer for the general public. Litigants, therefore, can not complain where they have had their two chances that there should be reserved to the discretion of the Supreme Court to say whether the issue between them is of sufficient importance to justify a hearing of it in the Supreme Court. The Supreme Court already has a wide jurisdiction by certiorari. That Court considers carefully the character of each case in which a cer-

tiorari is applied for. The examination of records for this purpose is part of the hard work of the Court, and the Bar ought not to suppose when a motion for certiorari is submitted that the Court does not give the motion the most careful consideration. This power enables the Court to get rid of a very large mass of cases that have but little importance save as between the parties, some of which are frivolous, many of which involve no principle that needs settlement by the court of final appeal because already well settled. Indeed, it often happens that in such cases, had the Supreme Court heard them, the results might have been different, but the difference would have arisen only from the peculiar facts and special application of the law to unusual facts, a decision of which by the Supreme Court would not be particularly useful.

The new law proposes, therefore, to enlarge the field in which certiorari is to take the place of obligatory jurisdiction. The situation is rendered critical by the accumulating mass of litigation growing out of the war, and especially of claims against the Government which, if allowed to come under the present law to the Supreme Court, will throw us hopelessly behind. As it is now, the important governmental constitutional questions that we have to advance and set down for immediate hearing postpone the regular docket and are likely to increase our arrears. Congress has shown itself in the past quite willing to follow suggestions with reference to such changes in its jurisdiction as may enable it to keep up with its work, and I hope that we shall find Congress in the same attitude of mind when this bill is perfected and introduced.

The three reforms, therefore, to which I invite your attention are, first, an increase in the judicial force in the trial Federal courts, and an organization and effective distribution of the force by a council of judges; second, simplicity of procedure in the trial Federal courts; and, third, a reduction in the obligatory jurisdiction of the Supreme Court and an increase in the field of its discretionary jurisdiction by certiorari. It thus will remain the supreme revisory tribunal, but will be given sufficient control of the number and character of the cases which come before it, to enable it to remain the one Supreme Court and to keep up with its work. I venture to ask the members of the Bar of the United States and of this important Bar to aid the cause of justice by promoting the legislation which I have attempted to describe.

There is no field of governmental action so important to the people as our courts, and there is nothing in those courts so essential to the doing of justice as the prompt dispatch of business and the elimination from procedure of such requirements as will defeat the ends of justice through technicality and delay. While the Bar and the Bench are really much less responsible for delays in legal procedure than the public are likely to think, the very fact that they are popularly supposed to be responsible should make us act with energy to justify the existence of our profession and the maintenance of courts.

ORIGIN AND SIGNIFICANCE OF CONSTITUTION

By JUDGE FRANCIS E. BAKER*

United States Circuit Court of Appeals, Seventh Circuit

MR. PRESIDENT, Mr. Chief Justice, and Members of the Chicago Bar Association: I esteem it a privilege on this occasion, made memorable by the presence of the Chief Justice of the United States, to join you in tendering to him our most cordial felicitations and good wishes.

Only eight men have preceded him in serving in that great office. The number "nine" might thus seem to have some importance. That importance might seem to be emphasized by the fact that he is chief in a team of nine. But I beg of you not to attach any extra-judicial significance to the number, even though he has been very busy in making decisions on strikes.

Two men, after serving as President of the United States, came back into the service of the people in official capacities. One became a member of the House of Representatives in Congress. That, although a most worthy service, might be considered a step down. The other became and is the Chief Justice of the United States. And that may well be counted as a step up. Not merely because, whereas he was once less than four per cent of the Presidents, he is now more than eleven per cent of the Chief Justices. There is a very substantial reason why lawyers and students of constitutional government should consider the Supreme Court of the United States the most powerful instrumentality in carrying into execution the written will of the sovereign people. Ever since Marbury v. Madison, that great tribunal, as the agent of the people, has restrained the people's legislative and administrative agents from acting beyond the scope of their powers of attorney. The right so to restrain them results not merely from the nature of the instrument, but as well from the express reservations in the Tenth Amendment. And there is a further reason: There have been times when the legislative and executive departments of government have yielded to the clamor of some insistent minority class or special interest. It has remained for the Supreme Court to be the Rock of Gibraltar to break the waves which otherwise might engulf the per.onal and property rights upon which our system of individualism is based.

Because our guest of honor is the chief expounder and defender of the Constitution, it may not be inappropriate to give a brief outline of its origin and significance. Not because you are not already familiar with this subject, but because many events in the last few years have made us realize that large numbers of people dwelling among us have no just conception of our institutions and are filled with erratic notions which unless corrected

*Address delivered at banquet of Chicago Bar Association in honor of Chief Justice William Howard Taft, Dec. 27, 1921.

may endanger the perpetuity of our republican form of government. In order that in our contact with them we may help to transform them into true American citizens, it may be profitable to refresh our memories.

The present phantasmagoria of the world's governmental nightmares warns us to reject all vagaries between the autocrat's schemes of imperial aggression and aggrandizement at the one end and the communist's dreams of proletarian dictatorship at the other, and makes us realize more than ever the wonderful work of our great-great-grandfathers five generations ago in evolving a plan of government of and for and by the people —all the people, without caste or class or special privilege.

The foundation stones were at hand. They had been gathered during our forbears' struggles of a thousand years to emerge from tyranny. Freedom of publication, of speech, of religious opinion; trial by jury in criminal and common law cases; due process of law in all cases; equal protection under the law; guaranties against ex post facto laws, against laws impairing the obligation of contracts, against Star Chamber self-incriminations, against invasions of the home for unreasonable searches and seizures, against arbitrary and unwarranted arrests and imprisonments—all these were ready and by common approval of the designers were builded into the foundational Declaration of Rights.

It was when the great architects came to planning the resplendent superstructure of our dual system of representative government, national and state, that their genius for accommodation, for calculating and providing against stresses and strains, came into play and produced a result that shall forever command the awe and admiration of mankind. Our earth moves in harmony among the spheres of heaven, balanced by opposing centrifugal and centripetal forces. If the centrifugal should preponderate, we would fly off into chaos; if the centripetal were the stronger, we would be dragged into the solar fires. And at the Convention presided over by the strong and wise Washington, there were opposing centrifugal and centripetal forces. On the one side were the great patriots who with prophetic vision saw, while yet we occupied only the Atlantic fringe, a continental domain inhabited by American citizens. They appreciated the need, then and now indisputable, of organization by States, in order that the particular local requirements of each State community might be ruled exclusively by State laws. On the other side were the great patriots who with like vision foresaw a mighty people consolidated into a mighty nation to stand forth among the nations of the world with equal sovereignty. They had been sharply taught by the impotence and failure of the Articles of Confederation that no plan of supergovernment based upon other governments as units has power to function; that no government has power to function unless it has the direct and immediate allegiance of the citizen and the direct and immediate right to put his person into its army and his purse into its treasury. Now with those opposing forces, if the centrifugal had preponderated so that all governmental power had been lodged in the sovereign States, we might today be torn and disrupted, just as Eastern Europe is today, by heterogeneous and hostile local laws and barriers; if the centripetal forces had prevailed so that all governmental power had been put in one central authority, we might today be ruled by an autocracy that would neither appreciate nor consider the multiform and variant needs of communities three thousand miles apart. But to the everlasting glory of our patriot sires, they composed their differences; they balanced evenly the opposing tendencies so that exclusively state matters are settled exclusively by the States and exclusively national matters are settled exclusively by the Nation; they clearly divided governmental power into three co-ordinate but independent branches, with adequate checks between them, so that no officials of any class should deem themselves the government and so that each official should know that he is merely a limited agent of the sovereign people; and thus they formed the "indissoluble Union of indestructible States," which for a century and a third has withstood all stresses and strains from within and without, and which, please God, shall endure "till the sun grows cold and the stars are old and the leaves of the Judgment Book unfold."

Union under the Articles of Confederation was a failure because the unit of membership was the State. Union under the Constitution is a success because the unit of membership is the individual citizen. With keen knowledge of what had caused failure in the one case and what was necessary to success in the other, it was nevertheless a tremendous labor, even among people homogeneous in language, traditions and aspirations, to work out the nice adjustments that hold in balance the opposing centralizing and decentralizing tendencies. And when the Framers looked upon their work and found it good, when they saw that the nice adjustments—the necessarily nice adjustments in a dual system of representative government—were functioning successfully, there spread from them to the people of their generation and thence to all succeeding generations of American freemen a deep-rooted feeling that our precious heritage should not be imperiled by external complications. That feeling did not mean that we should give up the making of treaties. To take a specific example, that feeling did not mean that we should not have a treaty with England whereby there should be no fortifications on the Canadian boundary and no vessels of war on the great lakes. That feeling was that Canada, or England for her, should have no voice in deciding our policy towards Mexico or other countries. And that feeling does not mean today that we shall not make a similar accord respecting other boundaries of ours on land or sea. When we were just beginning our contracts with other nations, that feeling was voiced in the Washington Doctrine: No entangling alliances. When we learned that we might be imperiled by European aggressions upon our weaker neighbors in this hemisphere, that feeling was voiced in the Monroe Doctrine: Bandits, beware. When the Great War taught us that we might be imperiled by aggressions in the other hemisphere, that feeling was voiced in the Harding Doctrine, proclaimed on the 4th of March, this year: "In expressing aspirations, in seeking practical plans, in translating humanity's new concept of righteousness, justice, and its hatred of war into recommended action, we are ready most heartily to unite; but every commitment must be made in

the exercise of our national sovereignty." Thus we have been ready, and assuredly we shall always be ready, to aid the innocent nation against the bandit nation, but we must be the judges, each generation for itself as occasions may arise, of what is innocence and what is banditry.

During the Great War we Americans, perhaps too careless in our manners, perhaps too heedless of our blessings, learned to salute with uncovered heads the stars and stripes as the emblem of our country's might. Let us not forget that custom, and when we salute Old Glory let us also think in reverence of the Constitution as the charter of our country's right.

Legal Aspects of Foreign Trade

Activities of the Division of Commercial Laws, Bureau of Foreign and Domestic Commerce, Department of Commerce, Washington

A NUMBER of inquiries have been received from members of the Bar as the result of the publication of data describing the activities of the Division of Commercial Laws in last month's issue of the JOURNAL OF THE AMERICAN BAR ASSOCIATION. Some of these letters were incorrectly addressed and were delayed in delivery. Please address as follows: Division of Commercial Laws, Bureau of Foreign and Domestic Commerce, Washington D. C. Kindly mention the JOURNAL.

On January 16 a Volunteer Cooperative Committee of Lawyers will meet in the office of Mr. Maurice Leon, of Evarts, Choate, Sherman & Leon, New York City, to provide the necessary professional guidance to the Division of Commercial Laws in the carrying out of its ambitious program of service to American foreign trade through legal advisers to American exporters.

The Secretary of Commerce having been recently appointed Chairman of the Inter-American High Commission, the offices of this body have been moved to the third floor of the Commerce Building, adjoining the offices of the Division of Commercial Laws and placing at its disposal, for reference purposes, a magnificent collection of foreign, principally Latin-American, codes.

There are now in preparation for early publications pamphlets on "Powers of Attorney in Latin-American Countries" and on "Company Laws of Latin-American Countries." The date of publication depends upon available appropriations.

Among interesting cases brought to the attention of the Division of Commercial Laws in the past few weeks the following may be mentioned. The views of any members of the Bar relating to the legal points involved will be welcomed by the Division of Commercial Laws:

1. Customer in Italy opens irrevocable credit in New York. Vendor effects shipment and receives drafts of the Italian Discount & Trust Co., New York, on another bank. He deposits drafts on December 29. Bank examiner takes charge of the Italian Discount & Trust Co. on the same day. Payment of drafts is refused. Goods are now afloat. The complainant is in the position of a preferred creditor of the bank in trouble. He can stop the goods in transitu, but in doing so will render himself liable to a suit for breach of contract and will lose his position as preferred creditor.

2. Letter of credit calls for shipment of goods by end of November. Goods are placed on the dock November 15. The scheduled steamer fails to put in appearance until December 3. The shipper received a Bill of Lading marked "Received for shipment." Can he collect under letter of credit? Answer is "Yes, under bank practice, but with recourse in case the customer declines the goods. Vendor should protect himself by a clause in contract providing for protection in case of vessels failing to keep scheduled sailing dates."

3. Debtor in Cuba mails a certified check to his creditor. The bank suspends before proceeds are collected. Has the debtor discharged his obligation?

4. Vendor sells goods to Bulgaria. A bank in New York takes charge of draft accompanying shipping documents, but expressly disclaims all liability for acts of the bank in Bulgaria which is to present the draft. The bank in Bulgaria ignores instructions. It is clearly liable but being a government institution it is difficult to proceed against it. Fortunately a prominent Bulgarian Chamber of Commerce official is in the United States and has undertaken to straighten out the matter.

5. Several pre-war contract claims in Germany. Settlement being offered at the present rate of exchange. Official action is awaited.

6. Seizure of goods by German Government on an unjustified charge of profiteering. Complainant being now assisted officially in the safeguarding of his rights.

7. Dispute with agent in Canary Islands. Advice given on best method of protecting the principals' rights.

8. Customer in Bolivia has a disastrous fire. He collects insurance from one company and opens another store. Another insurance company investigates origin of fire and files accusation of incendiarism. Customer lays his hands on all cash within reach and disappears. Cable investigation by State Department elicits facts and advice given on most expeditious handling of claims.

The foregoing cases have been taken at random from the Division's Daily File of Correspondence. Inquiries averaging 150 weekly are now being taken care of. The division is constantly in receipt of new lists of attorneys from various places, compiled by consuls and accompanied by a brief statement of the type of practice and the standing of the attorney. These names are transferred on cards, and whenever a member of the Bar requires the name of a good attorney abroad and applies to the Division of Commercial Laws stating the character of the business involved suitable names are submitted.

A. J. WOLFE.

AMERICAN BAR ASSOCIATION'S POSITION ON LEGAL EDUCATION

Agreements and Differences Between the Report of the Committee on Which the Action of the Association Was Taken and the Carnegie Foundation Report

By William Draper Lewis
Member of the Committee

THE forthcoming national Conference of Bar Association Delegates will be held in the city of Washington on February 23rd and 24th, to consider the subject of legal education. The conference is called by the Council on Conference of Bar Association Delegates, acting under the direction of The American Bar Association. At the last annual meeting of the Association, that body passed, by a very large majority, resolutions embodying certain principles with respect to legal education and admission to the bar. Their adoption is the occasion for calling the conference, and they will necessarily form the principal subject of its deliberations. These resolutions have already been set forth in a statement issued by the committee of the Association in special charge of the preparations in the December issue of the JOURNAL. The resolutions were proposed to the Association by the Section of Legal Education and Admissions to the Bar. They were originally prepared by a committee, of which Mr. Root was chairman. In the report of this committee to the Section, therefore, will be found the reasons which support the conclusions embodied in the resolutions adopted at Cincinnati, first by the Section of Legal Education and subsequently by the Association.

From the outset of its investigation the committee was fortunate in having a manuscript copy of Mr. Alfred Z. Reed's report to the Carnegie Foundation on "Training for the Public Profession of the Law," since published.

In view of the widespread interest aroused both by the report of the committee and by the report written by Mr. Reed, and in view of the inherent importance to the public and to the profession of the questions involved, I shall, as a member of the committee, try to indicate wherein the committee and Mr. Reed are in accord and wherein they differ. The excellent article by Dean Stone in the December number of the JOURNAL has relieved me of the necessity of defending the more important conclusions reached by the committee.

Before explaining the agreements and differences between the two reports, however, I desire, as a member of the committee, to express (and in this I believe I speak for all my fellow-members) my deep appreciation for the help derived from Mr. Reed's report. That the report is the result of the most painstaking labor is evident to anyone who examines its nearly five hundred pages. Furthermore, Mr. Reed, in tracing the history of preparation for the bar in the United States from Colonial times, has had to blaze his own trail. There have been articles and pamphlets pertaining to the history of particular law-schools or of particular legal educational movements, but Mr. Reed's is the first serious attempt to deal with the subject as a whole. Even where the committee believe him mistaken, we have derived great help from the fact that his arguments, and the facts he presents, made it impossible for us to be content to rest our own conclusions on mere assumptions or half-considered deductions.

Perhaps the most fundamental of all Mr. Reed's propositions is this:

> The professional practice of the law is a public function, in a sense that the practice of other professions, such as medicine, is not. (Training for the Pub. Prof. of the Law, Page 3.)

In explanation of this, he goes on to say:

> Practicing lawyers do not merely render to the community a social service, which the community is interested in having them render well; they are part of the governing mechanism of the state; their functions are in a broad sense political.

From the above he draws the deduction that it is essential to the preservation of democratic institutions that the bar shall be kept accessible to "Lincoln's plain people." (Pages 53, 418.)

With this premise and conclusion the committee is in full accord. Like Mr. Reed, they recognize the importance of preventing the privilege of practicing law from being confined to any one economic class. In this report, discussing the difference between conditions affecting the profession of medicine and law, they say:

> In the profession of medicine it is necessary to consider only one question with respect to technical education.—How can men best be educated to be highly skilled physicians? Nothing need be considered unless it relates to the technical efficiency of the graduate.
>
> With us, however, the situation is different. The law is a public profession by which more than by any other profession, the economic life and government of the country are moulded . . . The principle of opportunity for all applies peculiarly to admission to the legal profession. The physicians may properly exclude all who do not measure up to the strictest requirements of a technical standard. If this results in practically confining the right to practice medicine to men in comfortable circumstances, the public will not complain, for the public must at all costs have highly skilled physicians. But to confine the right to practice law to one economic group would be to deny to the other economic groups their just participation in the making and declaring of law. Such a restriction would properly be resented by the public. (Report of Special Committee, Pages 6 and 7.)

Again, the committee are in full accord with Mr. Reed's conclusion from his own observations that the bar in the United States to-day is not a unitary bar (see Training for the Pub. Prof. of the Law, Pages 57, 418).

By the expression unitary or homogeneous bar is meant a bar the members of which have similar professional ideals, and therefore the ability to act together effectvely for the realization of those ideals. Both Mr. Reed and the members of the committee agree that for a unitary bar to exist, lawyers as a class must have to a considerable degree the same cultural background, and must pass through one standard type of legal training.

The existence of two or more distinct systems of preparation for the bar, differing not merely in method, but in the ends sought to be attained, makes it impossible to build up a homogeneous legal profession capable of united progressive action.

The members of the committee agree with Mr. Reed in believing that the existing divison between systems of legal education, which is increasingly destroying the homogeneity of the bar, is not a division between office training on the one hand and law-school training on the other. It has for some time been evident that the law office is no longer competent to provide satisfactory training, and in states with a large urban population there will soon be hardly enough office-trained men among the younger members of the bar to count. That which is making a unitary bar increasingly impossible is the existence of widely different types of law-schools. (Training for the Pub. Prof. of the Law, Pages 63, 410.)

One type of schools has comparatively high entrance requirements, as one or more years of college training, requires the full time of the students for three years, and possesses as a nucleus of the teaching force a group of law teachers who, not being in active practice or on the bench, can devote their time to the work of the school. The other type has for the most part relatively low entrance requirements, and demands only a small portion of the time of the students. These schools hold classes in the late afternoon or evening, and are primarily designed for those who during the day are engaged in gainful occupations.

Mr. Reed believes that the first class of schools mentioned combine two of the elements which make for the highest type of lawyer,—an intensive course of technical training, superimposed upon a liberal education, the third requisite being high standards of professional ethics. (See Training for the Pub. Prof. of the Law, Page 61.) On the other hand, speaking of the impossibility of the bar examiners preparing examination questions which will be at once fair to each class and stringent enough to keep out incompetents, he says:

> Taking into consideration the effect of night law-school advertising in artificially stimulating a demand for legal education, there can be little question but that, in spite of all recent efforts to raise bar examination standards, more incompetents are today admitted to the bar than when, under laxer formal requirements for admission and a far smaller development of good law-schools than we now possess, the generality of actual applicants nevertheless received a sound training in the office of an old-fashioned practitioner. This may not be the only reason for the comparatively low repute which our present generation of lawyers enjoy, but it is at least a highly important contributory cause. (Training for the Pub. Prof. of the Law, Page 59.)

And he adds:

> The dark side of the present situation has been shown. Its bright side is that there has been at all times the element in the profession that has carried on the old traditions of the English bar. Originally composed for the most part of college graduates who studied in the best law offices, this element—though still very hazily defined—now tends to be composed of college graduates who have studied in the best law-schools. While in its lower ranges the bar, for the reasons just described, has been getting worse and worse, on top, at least from the point of view of intellectual mastery of the law (for of course there are crooks both above and below), the development of law-schools has made it better and better. Thus, beneath the formula of a technically unified bar within each state, the profession has actually become widely differentiated. (Training for the Pub. Prof. of the Law, Page 60.)

The members of the committee, I believe, feel that in the passages just quoted Mr. Reed has made a correct analysis of existing conditions.

When, however, we turn from Mr. Reed's analysis of the present conditions of legal education, and the resultant growing impossibility of creating a homogeneous and efficient bar, to the ends towards which any effort to improve existing conditions should be directed, we find fundamental differences between Mr. Reed and the members of the committee.

Mr. Reed believes that:

> A unitary bar not only cannot be made to work satisfactorily but cannot even be made to exist. (Training for the Pub. Prof. of the Law, Page 418.)

This belief is the key to his theory of the practical steps which should be taken to improve conditions by those who have the welfare of the public and of the profession at heart. In view of the absence of logical arrangement, I shall state the principles and conclusions on which the assumption apparently rests, in the order in which they first appear in the report, repeating for the sake of completeness the democratic principle already explained:

> 1. In a democracy it is essential that conditions for admission to the practice of law should not exclude those of slender means. (See Training for the Pub. Prof. of the Law, Page 3.)
>
> 2. The state will always admit to its general bar practitioners of types too diverse to be capable of uniting in a single forward-moving profession. (See Training for the Pub. Prof. of the Law, Page 238.)
>
> 3. Two kinds of legal education are destined to persist: One kind, the legal education given by law-schools, "rooted in our colleges and universities, and teaching national law by the case method, is destined to produce a minority of our actual legal practitioners, but text-books for all." The other, the legal education given by law-schools, not rooted in colleges and universities, but utilizing the labors of the faculties of the college and university law-school "for the purpose of training less thoroughly, but with greater emphasis upon the actual local laws, the great majority of our future lawyers and politicians." (See Training for the Pub. Prof. of the Law, Pages 416, 417.)
>
> 4. The intellectual requirements for different kinds of legal work are not the same. The education given in the relatively superficial schools seems particularly appropriate to prepare for work in "conveyancing, probate practice, criminal law and trial work." (See Training for the Pub. Prof. of the Law, Page 419.)

It may be doubted whether Mr. Reed's confidence in the correctness of his conclusion that a unitary bar is impossible rests entirely on these explicitly stated propositions. It may be that he also believes our democracy incapable of insisting on standards of legal education which will insure the highest professional efficiency attainable without violating democratic principles. I am not certain, but I think it is more likely that he assumes that it never will be possible for the bar to be accessible to "Lincoln's plain people" unless the required education is admittedly below the education required for the effective performance of the more difficult legal functions.

Mr. Reed's report does not contain definite recommendations for the improvement of legal education, though he does apparently suggest that there should be two examinations for admission to the bar,—one for the graduates of the full-time college and university law-schools, and one for the graduates of the relatively superficial part-time and local schools. (Training for the Pub. Prof. of the Law, Page 59.) His principal recommendation has only an indirect

bearing on legal education. It is that existing bar associations, such as The American Bar Association and the various state bar associations, should hereafter exclude from membership any man who has not superimposed on a college course of at least two years' duration three years of intensive training in a law-school requiring substantially the entire time of its students. In this way he believes that there would be built up an inner bar, homogeneous, and therefore capable of effective progressive action in matters pertaining to the improvement of law and legal administration. (Training for the Pub. Prof. of the Law, Pages 236-239.) Though he believes "something can be done at once to tone up statutes and rules of court, both for the purpose of assisting conscientious law-teachers in the better schools of each type, and for the purpose of introducing into the training of lawyers valuable elements that the schools themselves cannot provide," he is of the opinion that concerted action by bar associations to create an inner bar, resting on social and professional sanctions, "will produce more beneficial results a generation from now, than immediate attempts to secure, from legislators and courts, an ideally perfect system of bar admissions." (Training for the Pub. Prof. of the Law, Page 419.)

There is nothing I think in Mr. Reed's report which indicates that he fully realizes the disastrous effects on the public—especially the poor—of admitting to the bar each year an increasing number of superficially trained men without professional ideals. This omission is explainable when we realize that Mr. Reed is not a lawyer. The layman is keenly aware that the law and its administration in the United States leaves much to be desired. He probably tends to exaggerate rather than to underestimate the amount of rascality among lawyers. But he usually fails to realize the fact, plain to every well-trained lawyer, that the causes of the existing evils of which he justly complains are for the most part to be found in the failure to insist upon a proper legal educational system and adequate standards of bar admission.

Turning to the report of the committee, in order to ascertain the reasons for their specific recommendations, we find that in the performance of their duties, the members first addressed themselves to the question: Whether the different kinds of legal services which the profession is called upon to perform warrant different kinds of legal training. Put in another way, this question may be stated: Whether, irrespective of the desirability of a formal functional division of the legal profession, as in England, the work of the legal profession is as a matter of fact so diverse as to make a standard training for admission to the bar undesirable. The committee regarded this as a fundamental question, which should be determined prior to any investigation having for its object the improvement of existing legal educational conditions. They state the question and their conclusions as follows:

> Turning first, then, to a consideration of what a lawyer's training should be, we meet the suggestion that there must be different kinds of training to produce different kinds of lawyers.
>
> With this position we do not agree. In spite of the diversity of human relations, with respect to which the work of lawyers is done, the intellectual requisites are in all cases substantially the same. From the first interview with his client to the last step in litigation the lawyer must be trained to apprehend and to state the pertinent facts in logical sequence, to perceive clearly the questions of law presented, and to extract from statutes and decisions the principles of law applicable. And in every case, whatever its nature, he must be able to apply the fundamental principles of the common law.
>
> If an admiralty lawyer's work were fundamentally different in kind from a probate lawyer's work, a different training would be required for each, and a consequent classification of the bar would follow as a matter of course. In our opinion, however, there is no such difference between kinds of legal work. All require high moral character, and substantially the same intellectual preparation.
>
> Nor can there be tolerated a recognized distinction between good and poor legal education. There should be no distinction in training which does not find its complement in a distinction in practice. Because we cannot favor the continuation of a class of incompetent practitioners, we cannot favor the continuation of a system of training which fails to reach the highest practicable standard. (Report of Committee, pp. 3, 4.)

If this position is sound, it follows, as stated by the committee, "that all who intend to practice law should receive a training in accordance with certain prescribed and uniform standards." (Report of committee, Page 4.) It is indeed conceivable that two different legal educational systems may produce nearly equal technical skill. But even if this could be shown to be true, a uniform system adequate to give the technical skill necessary to practice law efficiently, has the immense practical advantage of tending to weld the bar into a homogeneous body, capable of performing effectively those public duties connected with the improvement of law and legal administration which the community has a right to expect the profession to perform. It may be proper here also to point out that the members of the committee do not fail to recognize that certain branches of the law, as admiralty, or practice before public service commissions, or patent law, require for their efficient performance special additional teaching and experience, and that they recognize that one lawyer may be temperamentally fitted for trial court work, another for office work, or a third for research and appellate work. But the position of the committee is that the intellectual processes necessary for efficient work in all branches of professional activity are so essentially similar that all members of the bar should have as a foundation a like cultural and technical training.

Having taken the position indicated in regard to the desirability of a minimum uniform standard of legal training, the committee took up two other fundamental questions:

> 1. To what standard should all legal education conform?
>
> 2. Would a requirement for admission to the bar, sufficiently rigorous to insure a profession able to meet efficiently the requirements of modern legal work, confine the right to practice law to one economic group, and deny to other economic groups their just participation in the making and declaring of law?

The answer to the first question has been carefully set forth in the committee's report. They are certain that adequate intellectual preparation for the practice of law is had, when to the successful completion of a college course is added three years of intensive study of fundamental legal principles in a law-school requiring substantially all the time of its students, possessing a good law library, and having among its teachers a sufficient number giving their entire time to the school to insure actual personal acquaintance and influence with the whole student body.

The committee then took up the second question. As stated, the members believe that the bar must be kept open to the son of the poor man as well as the son of the rich man; but they do not believe that entrance to the bar should be made easy for the person who has not sufficient intellect, energy or strength of character

to acquire a thorough education. They do not believe that any principle of democracy requires the community to give to a man merely because he is poor, or stupid, or lazy, a license to mis-practice law. On the other hand, they do not believe that the bar should be closed to all poor boys who do not have great ability and extraordinary persistence. Their position lies between these two extremes. They believe that the bar should be open to all those of good ability and aptitude for law, who possess sufficient character to enable them to work persistently and hard.

Applying this last proposition to the existing educational opportunities of the various economic groups in the United States, the committee have come to the conclusion that there is no good reason why the amount of educational experience required for admission to the bar should be not be enlarged. The minimum educational requirements suggested are not as high as would have been suggested if the only element to be considered was efficiency. They are of the opinion that every applicant for admission to the bar should have graduated from a law-school requiring for entrance at least two years of college work, and requiring its students to pursue a three years' course if they devote substantially all of their working time to their studies, or a longer course, equivalent in the number of working hours, if they devote only a part of their working time to their studies.

The committee believes that in nearly every state of the United States the educational opportunities today, especially opportunities for a college education, are such as to make it practicable for the boy who must rely on his own efforts for support, to meet these requirements, provided he has that combination of good brains, reasonable aptitude for law, and a willingness to work hard, which is essential for a useful career as a member of the legal profession.

The committee is aware that college education in America was once confined almost exclusively to those whose families had been Americans for several generations, and whose parents, though often of slender means, had a position of some consideration in the community where they lived. If this condition persisted today, to require some college experience for admission to the bar would tend to exclude the sons of those families who had not had for generations the tradition of a college education. Today, however, there are flocking into our colleges in great numbers young men and women from every group and social condition —the children of the immigrant as well as the children of those who can count a comparatively long American ancestry. The college tradition is rapidly becoming the tradition of every family, irrespective of its history or present means, whose members have energy and ambition. This change in educational conditions explains why, when the resolutions embodying the recommendations of the committee were before The American Bar Association, the clause declaring that every law-school should require for admission at least two years of college training, seemed a severe requirement to some older members present, while the requirement was looked upon by the younger members and by the majority of those in middle life, as entirely reasonable. The plea of some that it would exclude the poor but deserving boy was met by the fact that the meeting was filled with those who had "fought" their own way through college and law-school, and had not found the task unreasonably difficult.

The recommendations of the committee now adopted by The American Bar Association after a thorough and interesting discussion, show that the committee believes that it is worth while to strike directly at those existing legal educational conditions which fill the bar with a type of legal practitioners who bring the administration of law into contempt. Existing facilities for a good general and for a good legal education give the committee hope that the public—who are vitally interested in having the law efficiently administered—can be made to see that no democratic principle is violated by a standard of legal education and admission to the bar high enough to insure not only far greater efficiency in the conduct of legal business, but also a bar more responsive to its public obligations, because more homogeneous—more nearly a unitary bar.

The Problem of Fee Adjustment

"One of the most difficult problems which a lawyer has continually to face is the adjustment of fees," said Mr. Logan Hay in his presidential address to the Illinois Bar Association in 1921. "The young lawyer is perhaps familiar with certain general principles which should guide him in making his charges. But as a practical matter, these general principles are of but little use to him in determining the proper amount to be charged. The particular matter which he has had to deal with is perhaps of an entirely different character from any with which he has heretofore had to deal. It is of great use to him to know what is the usual and customary charge of other lawyers in matters of that character. The object of our schedule of fees has been to make this information as to the customary and usual fees, a thing which may be known to all lawyers. It is not the purpose or intent of the schedule of fees that no lawyer shall charge in any particular matter more or less than the amount indicated in the schedule of fees. He is at perfect liberty to fix his fees as he will, but the Bar Association aims to give him the information as to what is the usual and customary charge in the matter. It may well be that the particular amount with reference to a particular class of service mentioned in the schedule of fees is too high or that it is too low. If such is the fact, it is only because the Committee which framed the schedule of fees did not have available the proper amount of information from the members of the Bar as to the usual and customary charges which were being made by lawyers in that particular class of cases. As the lawyers of the State, from year to year, come to realize the true purpose of the schedule of fees and furnish to the proper committee of the Bar Association the information as to what they are actually charging in particular classes of matters, the schedule of fees will become a more and more valuable guide to the lawyer in his daily practice.

"Nor is this matter of the standardization of fees one in which the lawyer alone is concerned. The client, who is called upon to pay a fee, is even more helpless than the lawyer. He has even less information as to what is the usual and customary fee in such matter."

POPULARIZING ADMINISTRATION OF JUSTICE

Need of Making Work of Courts More Intelligible and Satisfactory to Public by Removing Grounds for Criticism as to Law's Delay, Cumbersome Procedure, Technicalities and Expense*

By Hon. Henry D. Clayton

Judge of Federal District Court, Alabama

THERE are so many ways in which and so many occasions on which the courts of our country come into vital and cherished relations with the life of the average man and woman, or, as it may be said, there are so many instances of daily occurrence in which judicial action directly or indirectly affects the happiness of the citizens, that I think it appropriate to invite your attention to the subject of popularizing the administration of justice. Surely if it is a matter of general concern, as you will agree it is, it must follow that such administration should be made more intelligible and satisfactory to the common people, that is to the average citizen, so that there may be a better and more sympathetic understanding of the work of judges and courts. And if such understanding is had much of the discontent sometimes manifested towards the judiciary will have little cause, if any at all, for foundation. Much of the spirit of unrest and dissatisfaction, especially in regard to the courts, will cease, and bolshevism which the world war bequeathed to us, and socialism, for the most part imported, will cease to spread if they be not wholly destroyed, and our experiment of popular government, a government of laws, will continue to be respected as the best plan for the maintenance of organized society, our civilization itself.

If we keep in mind the true conception of justice we can the better judge the law, substantive and procedural, in its every relation to justice as a practical and a most desirable thing in government. "Justice, sir, is the great concern of man on earth." "Justice is the end of government." I do not quote these utterances of great American statesmen in imitation of the idea which sometimes actuates the essayist, who imagines that the trick of linking a commonplace with a great name invests the obvious and accepted truth with some sort of oracular wisdom; but rather, these apt and forceful words are given in order that your attention may be more closely attracted to the thought. Of course it may be said that such appraisement of justice was true before Webster and Hamilton spoke and wrought in behalf of good government. Indeed history and the very philosophy of government evidence that the great human purpose running through all the ages has been the establishment and administration of justice.

Lawyers are first, as they should be, to take notice of complaints against judges and courts; and you will agree that they ought to lead in the effort for improvement in the administration of justice. In this great undertaking it is nevertheless the duty of every citizen to realize his responsibility and assume active interest in the part of the work which may be his. It is not the duty of the judiciary alone to bring the courts into closer and more understandable relations with the people; nor is it exclusively the obligation of the legislative and executive branches; but it is the common work to be shared in by all for the general benefit. The farmer, the laborer, the merchant, in short the man of any vocation, must perform his part in our representative government. Obviously, such co-operation will serve to give a better public estimate of the functions and work of the judiciary.

Before suggesting how justice may be better administered it is well to take note of some of the criticism of judges and courts. However, it is not to be expected that all criticisms directed at the administration of justice can on an occasion like this be dealt with in a detail way. Nor is it important to consider every complaint; for instance, except as a matter of history, it is of no interest to recur to the agitation of a few years ago for the recall of judges and judicial decisions, for these proposals did not meet with the approval of any powerful number of thinking people and were, therefore, we may say, condemned by the public. The public knew that as a rule judges and courts measured up to all just expectations, and that law had not become and can never become an exact science. The people also knew that judges and courts could not make the law but were charged to act under the law, within its authority, and were bound by its limitations, for there are limitations sometimes expressed and sometimes not expressed but understood, which are a part of the law. The necessities of the times, ideas of morals, and political theories were discussed and resorted to to further these innovations. Besides, in regard to federal judges, it was said that the Constitution did not provide any adequate remedy for removing an unworthy judge—that impeachment was a failure. Whether or not there was any basis for this assertion may have been debatable if we examine the adjudged impeachment cases. Beginning with the case of Judge Pickering, of the United States District Court of New Hampshire, impeached in 1803, down to and including that of Judge Archbald, of the Commerce Court, impeached January 13, 1913, there are only six cases where federal judges were tried under impeachment proceedings, and only three of them were convicted—Judge Pickering, accused of inebriety and profanity while on the bench, who was suffering at the time of his trial from senile decay and was not able to make his own answer; Judge Humphreys, of the District of Tennessee, who abandoned his office, allied himself with the Confederate Government, and made no defense; and that of Judge Archbald of the Commerce Court, who was found guilty of improper

*Address delivered before the State Bar Association of California at Riverside, Oct. 22, 1921.

conduct, including the abuse of his office for the gain of money. Of the case of Justice Chase of the United States Supreme Court, I think it is fully agreed that acquittal was proper. The case against District Judge Peck of Missouri did not seem to warrant conviction. As to that of Judge Swayne of the Northern District of Florida, it was clear to my mind, as one of the managers on the part of the House, that he should have been impeached.[1] Perhaps that case gave more comfort than anything else to the advocates of the recall who alleged that impeachment was ineffective. However, when the Senate, sitting as a court in the Archbald case, vindicated the law of impeachment, there was a judicial ascertainment that the constitutional provision, namely, "The judges . . . shall hold their offices during good behaviour" necessarily carried the corrollary that they should not hold if guilty of misbehaviour; and that impeachment was an adequate method for removal. Since action in that case we have heard no more of the recall of judges. And doubtless the sober common sense of the American people has reached the conclusion that the recall of judicial decisions, even decisions confined to construing the police power and the public policy, would not best subserve the general welfare but, rather, that such departure would be a step in the direction of socialism and, certainly, away from the wise doctrine of the fathers so often expressed in our laws, beginning with the formation of government under written constitution.

You will permit me to digress and say that I came in official and personal contact with five presidents and have nothing but pleasant recollections of each of them, but in my opinion President Taft had a finer appreciation than any of the other four of the functions of judges and the courts; and I know that he always exercised his right to select for judges men whom he thought best qualified and without regard to politics or partisan pressure. It is a matter of history that he took the Judiciary Committee of the House into his confidence and from time to time submitted to it for investigation charges against judges and that during his administration one unworthy judge was removed from office and another resigned in face of impeachment.[2] Perhaps it is not too much to say that to President Taft more than to any other one belongs the credit of finally silencing the clamor for the recall of judges and judicial decisions.

The criticisms which should engage our attention are those now directed at the administration of justice, among these, the law's delays, its cumbersome procedure and technicalities, and its expensiveness. Of course it is not within the province of this paper to discuss any particular substantive law, whether organic or statutory, or judicial precedents or accepted custom adopted into law. It is with the sins of commission and omission of procedure and practice, the adjective law—that law governing the courts in the application of the substantive law in the administration of justice where rights of individuals are adjudged or public interests upheld—that will be particularly considered.

Before and ever since the melancholy Dane soliloquized, the law's delay has been a byword and a reproach, a source of mental perturbation, unhappiness and often financial ruin. It has been a subject of ridicule, a hindrance to the better accomplishment of the aims of society and has tended to fetter the progress of jurisprudence which is and must be a forward-moving and a developing science. Let us take the case of a citizen entitled to redress for wrongs done him, who at the same time should as of right have redress or compensation which the law may allow awarded to him without unreasonable delay after the accrual and assertion of his claim. On the other hand, if an unjust claim is asserted against a citizen as a result of which his property interests are involved, he should not be embarrassed or annoyed or his business interfered with any longer than it is necessary, consistent with reasonable and fair processes. Manifestly, it is a truth and more than a mouth-filling phrase to say that justice delayed is justice denied. To obviate this reproach the capable and industrious judge can do his part in expediting trials and in better fashion if he has the sympathy and the help of his brethren of the bar; but even with that he cannot be sufficiently and properly freed from the hindrances of antiquated procedure without necessary legislative action. And this deterrent in the form of mere process breeds complaint, some not well founded, it is true. Christ said, "the poor always ye have with you," so likewise it may be said that we will always have with us the demagogue, sometimes ignorant and honest, and the platform lecturer also, who in instances not too rare has no thorough knowledge or understanding of any important thing but is full of half-baked ideas, and can emit, with ease, high-sounding, senseless rhetorical vaporings and misinformation against judges and courts; and then, too, impatient litigants hold the courts responsible for all delays in the administration of justice, and many of them seem to think that the presiding judge alone is to blame for every postponement. The truth is, the judge or court cannot in the present circumstances always do the larger part in hastening trials. As a general rule the terms of state courts are fixed by law and must be held only as thus provided. Archaic ways of stating the plaintiff's case to the court, useless and redundant methods of pleading—common law fossils—are still allowed in many jurisdictions. The legislature prescribes the time for filing bills of exceptions, for the taking of appeals or writs of error, and all steps necessary to bring the case to a conclusion. As to all these the judge has little to say. He can, it is true, hold special sessions; he can require the attorneys in the suit when the case is once before the court to act with reasonable speed. Often he can refuse continuances and try cases at the time set for trial. And yet if his inflexible rule is to require trials at that time he is apt to do injustice sometimes to one of the parties. It is true he can dispose of cases submitted to him with convenient dispatch and not hold them for consideration longer than is necessary to understand the facts and the principles of law applicable. These and some other things he may do without transcending law or propriety, but he often finds his

1. See bound vols. proceedings Judiciary Committee House of Representatives 58 Congress second session and bound vols. of Proceedings in House and Senate in case of Judge Swayne, 58 Congress.

2. See bound vols. 1 to 3 inclusive of proceedings of the Senate and House of Representatives in trial of impeachment of Robert W. Archbald, 62 Congress, third session; and bound vols. testimony taken by Judiciary Committee of House of Representatives case of Judge Hanford, 62 Congress, second session.

hands tied by statutes prescribing and proscribing too much the details as to how the mere rules of procedure shall be applied in the trial of cases.

There seems to be a too great distrust on the part of legislatures of the judiciary and the tendency of some enactments is to put the judge or the court into a strait-jacket, thus denying reasonable and wise latitude for the operation of judicial discretion. However desirable some may think the delimitation of this discretion is, the stubborn fact has always existed and must continue to exist, that such discretion is a necessary part of the law, the law common to all courts. As you know judicial discretion is an inheritance from the common law and must be often exercised in the process of reaching the true ends of justiciated controversies. Doubtless it would be well for all to bear in mind that if a trial judge exceeds the law or abuses a discretion there is always the remedy of review and correction by the appellate court. Less legislative distrust would serve to diminish public distrust in the administration of justice.

One of the contributing and patent causes of the law's delays which lies in the power of the legislative department to remedy is the fact that in many states and in some of the federal districts there is not the sufficient judicial force to dispose of the present litigation and that which is constantly increasing as the country grows in population and develops in commerce and industry. Besides, the courts are constantly having to deal with much new legislation, amendatory and original; consequently, there is from this source increased litigation, involving interpretation and application of statutes resulting in the accumulation of cases. Because of all these facts and other similar things court dockets become congested and all cases cannot be reached for trial until after undue delay in some of them. The intelligent public will not censure the courts for all this, for I think it will be admitted that most judges give the best of their time and talents, and industriously so, to the service to which they have dedicated themselves.

It is gratifying to note the interest manifested by the public in the matter of providing adequate force for the discharge of judicial functions. As a part of the unofficial public the American Bar Association is continuing to evidence the liveliest concern in the subject; besides, another part of the unofficial public, other voluntary associations of lawyers are unselfishly giving their time and thoughts for the betterment of federal judicature. Two suggestions are pending in Congress, one for amending and enlarging the scope of Sections 13 to 18, both inclusive, of the Judicial Code and the other for the appointment of eighteen itinerant district judges whose duty it will be to hold court not in any particular district but to officiate whenever and wherever they may be designated, according to the provisions in the measure. And there is another suggestion coming from a number of eminent lawyers and it is that Congress appoint a joint committee of senators and representatives to study the whole subject of administration by the federal courts and to report their conclusions and recommendations for comprehensive legislation. Admittedly, if the first suggestions be adopted into law some relief will be afforded in the transaction of business of the courts, that accumulated and that surely to come in greater volume. But the bill for the eighteen itinerant judges, on its face, professes to be no more than a temporary expedient, and is a confession that a more comprehensive and better plan can be found; moreover, it is one way of saying that sooner or later Congress will have to deal with the subject in a broader and more permanent fashion. The provision for bringing the Chief Justice and certain other judges together in annual conference is upon the idea that the Chief Justice should make closer survey from time to time of the business of the courts and that thereby the whole federal judicial force would be better utilized.

Whether Congress shall work out a plan of its own or adopt that in pending tentative bills, originating not with Congress, must be determined by the good judgment of the Senate and House. As an American citizen, a unit in the constituency of Congress, as one who devoted eighteen years to doing his humble part in framing laws at Washington, and who has had seven years experience as a federal district judge, let me trust that I may, without violating propriety, make further criticism of these two bills now pending in the Senate. They are in some degree cognate to my subject under discussion, for their professed aim is to improve, to popularize, using the word in every good sense, the work incumbent upon judges and courts. The bill, S. 2433, to create 18 district judges "at large," is not without objections in addition to that of its being a makeshift. It is a new proposition in legislation and is at variance with established legislative policy—a part of the public policy adopted at the time district judges were first created. It was then deemed wise to have the judge resident in the district where he should have an immediate constituency somewhat as a representative or senator has; thus he would be more interested in and feel a greater responsibility for the conduct of the business of the court in his district. I say all this with the knowledge that this policy has not always been strictly adhered to, for it is familiar that Sec. 13 of the Judicial Code was so amended as to allow the judge of a district court in one circuit to be designated to hold court in a district in another circuit under given circumstances. This departure from the policy was based upon necessity and expediency and was limited in application to given extraordinary facts and circumstances. But it is respectfully submitted that this affords no guiding precedent in considering the 18 judges bill. It may be admitted that good may come from the proposed annual conference of a limited number of judges at Washington but still the fact will remain that always and from time to time the senior circuit judge will understand the conditions and requirements in his circuit better than anyone else; and this must be so for the evident reasons that he comes in frequent contact with the district judges and is constantly taking note at close range of the business of the courts in his circuit. He should have the untrammeled authority that he now has of designating judges in his own circuit for the transaction of business there. For these and other reasons I agree in the main with a distinguished judge[3] who has given fifteen years of useful service on the bench when he said of this 18 judges bill. "It is entirely bad," and further, that "the proposed annual conference to review the regular district

3. Letter of Judge Sheppard (appointed by President Roosevelt) to Senator Nelson.

judges and provide ways and means for the dispatch of business to the extent of 'mild visitations' would manifest a dictatorial power over the courts unrecognized in our jurisprudence, . . . The judges should not be subjected to intimidation. Such would tend to destroy their independence and diminish the public respect. Public opinion and the good will of the bar is a far greater incentive to the judge's honesty and conscientious discharge of his duties than any sort of 'visitorial' correction by a council of judges who are unfamiliar with the widely varying conditions and temperaments of the many Districts"; and that "The useful provisions of Bill 2433 (the 18 judges bill) are amply covered by bill 2523;" enlarging upon Sections 13 to 18, inclusive, of the Judicial Code, as amended. And I hope I may be permitted to suggest that the latter bill would, with a few amendments obviously proper, go far towards solving in a better way the question of more efficiently utilizing the judicial force we now have and would be largely free from objections mentioned. And again, instead of 18 floating judges it would be better to have the necessary permanent judges appointed and resident in the district for which they are appointed, for reasons among others, that the business of the district courts will never diminish, as we must know.

It is manifest that the business of the courts generally and particularly in say New York, Philadelphia, Chicago, Boston, Baltimore, New Orleans and San Francisco will never be any less than it now is, but rather it is reasonably certain to become of greater volume. Of the Mann Act there will continue to be infractions until all men obey the seventh commandment or unless young men shall be sublimated as old men are by the compelling influence of relentless years. And here we may say that this White Slave Traffic Act was enacted under the commerce clause to stop the importation of women for immoral purposes, but the Supreme Court has found the act to be a greater adjunct to the decalogue. Like the fourteenth amendment that law has more significance than thought of by some simpler minded men, I was one of them, who voted for its passage. Doubtless the states will continue to stand by and see the federal government enforce this law of personal purity. States will proceed as they are now to let the federal government bear the labor and expense of restricting as far as possible the number of drug addicts. And it may be that the states will become weary of their part in the co-operation and cost of enforcing prohibition. There is hardly a doubt the bankruptcy act will never be repealed, and it is highly probable that business under it will not as a rule be diminished. Of course admiralty cases we will have in greater number as long as ships in increasing number float in our harbors. It is known that one reason why corporations are chartered in a small state to do business in other states is that they may have suits against them transferred to the federal court rather than risk trial in a local or state court. Business from all these sources and others permanent, will increase *pari passu* as trade expands and commercial ventures multiply. Besides, the records of the courts now show an increasing number of cases arising out of business controversies where there is diversity of citizenship of the parties. Moreover some legislatures continue to pass some acts violative of the commerce clause and other provisions of the Constitution. These acts will continue to be, as now, attacked in the district courts. Then, too, in many jurisdictions there is a growing disposition to bring in or to remove to that court all civil cases within the federal jurisdicton. For all these reasons as well as for others I submit that the question of relief to the courts should be dealt with not as temporary but as permanent matter of increasing magnitude.

Is not the suggestion of the voluntary association of lawyers, composed in part of Mr. Felder of New York and your own Mr. Hodghead, wiser than that of the proposals in the 18 judges bill? That association proposed that a joint committee composed of senators and representatives be raised to consider from every angle the procedure of and the business of the federal courts, with the duty of recommending remedial legislation. In many important instances such committees have met the just expectations of the public and framed laws solving difficult problems. With due deference it is submitted that the Congress, composed for the most part of wise statesmen experienced in the art of lawmaking, is better qualified for that work than any three or more men who have judicial experience and who have had no constructive legislative experience.

Now, if after all we are to have a Sanhedrin at Washington, composed of a relatively few judges and not, as formerly was the custom, of the chief priests and the scribes and the elders of the people, there is much assurance in the fact that Chief Justice Taft and not a Caiphas will be the presiding high priest. And we know that he is a worthy gentleman of large learning and experience who always practices the virtue of fair consideration in everything. There is no reason to doubt that even towards any factor in the immense problem of the better administration of law he will act within the scope of his fine sense of respect for all. Still let me insist that it is proper and better for Congress to supply the judicial force and, as far as may be practicable, direct its better utilization—to "allocate" as the bill has it, the judges as far as practicable, as I have said, and permit the Chief Justice under the certain extraordinary circumstances and the senior Circuit Court make assignments, as they now can make. Par parenthesis it may be observed that until after war legislation had brought into prominence "allocation" that word was always applied to things, property and land, and never to judges.

Let me suggest that a short letter from the Chief Justice to the district judges would produce answers from them giving full information as to the actual conditions of their dockets and the business of their courts, and if he requested it I doubt not that the judges would signify the time that they could give for the relief of the courts in other districts or would state what help if any is needed. And under Section 13 of the Judicial Code as it is proposed to be amended, he can act without the expense of an intervening conference of judges. The war idea of mobilizing judges under a supreme commander as soldiers are massed and ordered may not tend to popularize federal judges or increase the efficiency of the courts. Judges are not soldiers but servants, and the people only are the masters whom they serve. It is hardly necessary to say that if the judge is unfaithful there is a remedy for

his removal, and the House of Representatives and the Senate are the authorized agents of the sovereign people.

However the number of district judges may be increased, and however great the necessity for it, I think improvement in procedure and practice is equally as imperative. To meet the demand for this there has been submitted the bill pending in Congress to authorize the Supreme Court to prescribe forms to regulate pleading, procedure and practice on the law side of the federal courts. It is no more than a proposal to authorize the highest court to do in respect to cases at law what it has done so well in respect to cases in equity and admiralty. This measure has heretofore been favorably reported, as you know. It recognizes the dissatisfaction of members of the bar and the people at the complexity, uncertainty, delay and costliness of justice in the courts. It is known that a majority of the United States Circuit and District Judges, who presumably have studied the subject, favor the measure. It is also public information that while he was president, afterwards while he was citizen and publicist, and now since he has become Chief Justice, Judge Taft has been and is the pronounced advocate of this bill. Many of our ablest lawyers, among them Mr. Root, who I think, by the consensus of opinion of lawyers, is the leader of the American Bar, have urged before committees of Congress and elsewhere the need of and the reasons for its passage. And it is believed that rules by the Supreme Court governing procedure and practice in the federal courts would be a commendable standard of simplicity, and that such standard would be followed by the states, for they, too, would be glad to do their part in making law administration more intelligible and satisfactory. Such rule-made procedure would not have the inelasticity of statute or code but could be readily amended wherever and whenever experience demonstrated the wisdom of amendment. We do know that ever since pleading became an ossified science in the seventeenth century it has been the desire of the lawyers, who were at the same time publicists, and judges too, in the main, particularly so in recent years, to unfetter the courts in the work of applying substantive law. Of course it is not intended to exceed the Constitution, which commits the lawmaking power to Congress, for the tyro knows that such dual body has the sole power to make the laws, with the exception that treaties are negotiated by the President and consummated by the Senate. It is a statement of the familiar that courts must take the law as given under legislative power. However, we are told by John Selden, jurist, legal antiquary and scholar, that "parliament of England has no arbitrary power in point of judicature but in point of law only." It may properly be insisted that how the courts may do their work in the details of procedure, in the use of the necessary machinery, should be left more largely and can be so left in a constitutional way, to be sure, to the courts[4] than it has heretofore been done. This is to say that the courts should be allowed greater latitude in making the rules governing procedure, and that this would bring an adjective law "based upon the common intelligence of the farmer, the merchant and the laborer, and there is no reason why it should not be. . . . There is no reason why a plain honest man should not be permitted to go into court and tell his story and have the judge before whom he comes permitted to do justice in that particular case unhampered by the great variety of statutory rules; instead of which we have got our procedure regulated according to the trained, refined, subtle, technical intellect of the best practiced lawyers, and it is all wrong." This language was used by Mr. Root in speaking in criticism of the code of procedure of his own state.

Recently the editor of a well known publication said to me in substance that the federal courts are faithful and painstaking in deciding the cases that come before them, and as a rule they try to get to the merits of the cases, although they must in a great many instances work through the jungle of procedural matters in which it seems we Americans take particular pride or in which we have so entangled ourselves that it is difficult to work our way out of that jungle. Going through the indexes of the Federal Reporter there is comparatively little matter under the practice heads such as Appeal and Error, Criminal Law, Pleading, Trial, etc., whereas the state reports are full of such matters; there is enough even in the federal cases.

The venerable Section 914 of the Revised Statutes has become more and more inapplicable to litigation in the twentieth century for jurisprudence has outgrown some of the mere methods and technical processes of the long ago. It is incontrovertible that no court, state or federal, can always properly function under the common law system of pleading. In fact no court attempts to do so in all respects in every case. As to the effort to get away from the highly technical methods taught by Chitty and Stephens there is abundant evidence. There is, for instance, the code plan in a number of our states. And there are in every non-code state numerous statutes modifying or abolishing many of the rules of common law pleading. I have in my office a valuable but formidable work on procedure covering 24 volumes and 3 supplements, each volume containing more than a thousand pages; and in every law library there are many books on the specific subject of Federal Procedure. Let me emphasize that the modern idea is to do justice in every case according to the substantive law, not let justice stick in the bark; and pleading is, generally speaking, only the bark and justice lies within, in the merits—in what the real law is.

If it be said that the lawyers in the different states are acquainted with procedure in cases at law and, therefore, should not be required to master a separate federal procedure, the answer is that such position is not now tenable for there has already come a federal procedure which, by force of necessity and common sense, is growing every day more into a system. That a knowledge of the common law pleading or of code pleading equips a lawyer skilled in the procedure of any state with the requisite knowledge of procedure in the federal courts on account of the conformity statute is contradicted by evidential facts. Besides the text books devoted to the separate subject of federal procedure, there are more cases in which the federal courts have not followed state rules than you have the time to hear named. It is certain, therefore,

4. Wayman vs. Southard, 10 Wheat. 141; U. S. Bank vs. Halstead, 10 Wheat. 51; Cap. Trac. Co. vs. Hof, 174 U. S. 1; Vicksburg R. Co. vs. Putnam, 118 U. S. 545.

that there is a federal procedure and practice different in essentials from that of the state in which a federal judge exercises his office. Indeed the federal courts are not fully bound to follow the state practice, for in the conformity statute there is at least some liberty to the court not to follow the state practice. The statute says that it shall be done as near as may be, but that it cannot be done in many cases the numerous decisions furnish the proof. Our jurisprudence has expanded beyond its condition when Senator Carpenter, a great lawyer, wrote, in its present form, I believe, the Conformity Statute in 1872—49 years ago. Perhaps the author and Congress did not at the time of the passage of the Conformity Statute contemplate that there would come state code systems of pleading such as now obtain in so many states. The suggested plan of rules for procedure and practice in the district courts is as between that of the common law system modified by statutes on one side and the code system on the other, the *juste milieu*. If the common law plan cannot be followed, and it cannot, the code plan is not better for it has been fruitful of uncertainty, of new technicalities and refinements. Furthermore, in the nature of things it is impossible for a federal judge to be familiar with all the state statute laws and the state decisions thereunder. And even the lawyer well informed on state rules, before he goes into the federal court studies the books on federal procedure and the cases relating to the same, or else he obtains the assistance of a lawyer who has familiarized himself with the procedure there.[5]

Coming now to another cause of delays, it is to be said that in frequent instances the time allowed for perfecting and taking appeals is too long. In some courts periods of six, twelve and sometimes twenty-four months are allowed for taking appeals when much shorter time would be sufficient to do justice to all the parties concerned. Particularizing, in some states the party appealing is allowed ninety days in which to prepare his bill of exceptions. It is almost unimaginable that so much time is actually needed for that purpose. It is possible that a case which has consumed several days in its trial may necessitate a month or more for the preparation of the bill of exceptions, but in the average run of cases appealed to a higher court the bill could be easily and doubtless more satisfactorily prepared in ten days, and certainly within thirty days. Then again, in some states after the bill is presented to the judge he has ninety days in which to authenticate it, when as a matter of fact in well-nigh every case he could do this in less than thirty days. And furthermore, it ought not to be in any case a matter of doubt when a party desires to have the judgment of the trial court reviewed as to which method shall be pursued, whether or not it shall be that of appeal or that of writ of error.

It would seem, also that the time allowed a defendant to plead, answer or demur to the complaint or declaration is oftentimes too long and productive of undue delay. In this connection it is interesting to note that the new federal equity Rule 12 requires a defendant to file his answer or other defense "on or before the twentieth day after service." This has resulted in a very commendable shortening of delays on the equity side of the federal courts; and it is believed that if the Supreme Court is ever given power to prescribe rules for the law side delays there will be appreciably lessened.

One of the things which breeds some delays is that of "hung" juries. Too often in unimportant cases juries spend hours trying to secure a unanimous verdict and at last report disagreement. The rule requiring unanimity in jury verdicts has long been under the fire of some of the country's ablest lawyers and judges, yet each time when the subject is brought forward its proponents are charged with attempting to destroy the entire fabric of justice. Many years ago Bentham described the unanimity requirement in jury verdicts as a "system of perjury enforced by torture" and those who have sat upon some juries will almost agree with him. Hallam bluntly calls it, "that preposterous work of barbarism." Nearly a hundred years ago the body of experts appointed by the English Parliament to investigate the courts of common law, said, speaking of majority jury verdicts: "It seems absurd that the rights of a party in questions of a doubtful and conflicting nature should depend upon his being able to satisfy twelve persons that one particular state of facts is the true one." And that committee, very conservatively, proposed that after twelve hours deliberation the opinion of nine jurymen should authorize a verdict. Later Lord Campbell introduced a bill to that effect but the rule was not disturbed.

The average layman, and he is not without company, can not understand, especially in civil and minor misdemeanor cases, why it should be essential to have unanimous agreement before a verdict can be made. As he looks over the history and practice of other branches of the government he sees that unanimity is not required anywhere except in the verdict of a petit jury. He knows that the Supreme Court of the United States passes upon questions which involve the life, liberty and property of countless citizens. He sees them strike down as null and void the acts of the legislatures and the acts of Congress, and determine questions affecting the welfare of state and nation, and yet no one expresses surprise because a majority of the court has the deciding power. He sees the Senate of the United States, the greatest deliberative body in the world, pass upon treaties which involve the rights and happiness of every citizen; he sees the Congress levying taxes and excises which affect the articles he buys; he sees the entire young manhood of the nation selected for armed service in time of war and nobody ever gets excited because the action was determined by a two-thirds vote of the Senate or by a majority of a quorum of the two houses. It is almost a monthly occurrence for the commissions established by the national and state legislatures to fix rates and wages affecting millions of citizens and the commerce and business of the entire country, and yet no one ever suggests that the decision in any such case should be unanimous. Then, the layman wonders, why is it necessary in the trial of a suit which involves say a $50 cow each of the twelve jurymen shall be of the same opinion or else a mistrial had. Why is it that in misdemeanor cases, sometimes involving a small fine or at the worst a brief sent-

5. In 1916 I made an address before the Missouri State Bar Association, printed in its official proceedings, dealing more at length with this subject.

ence in jail, should it be necessary for every one of the twelve to come to the same conclusion?

It may be that the argument is more particularly appropriate to civil causes than to criminal cases for we remember that in the latter the rule is that the evidence to warrant a conviction must be so strong and cogent as to establish to a moral certainty the guilt of the defendant, while in the former the issue may go according to the preponderance or according to lack of it. While the unanimity rule may be good in felony cases it is difficult to understand why in minor misdemeanor cases a less requirement would not be just and fair. It seems right, asuredly in civil cases. After awhile this rule may be more generally favored and then some disagreements of juries, with consequent loss to the state and litigants will not be had. Then it will not be possible as it now is under the present rule requiring unanimity for one perverse juror to, without rhyme or reason, prevent a verdict. If three-quarters of the jury were allowed to return one justice would not be unduly hazarded, for the court stands "like the reserve of an army to protect it from disaster;" ready, if necessary, to arrest the judgment or set aside the verdict when in conflict with law, the evidence or substantial justice.

I am told by California lawyers that the rule allowing three-fourths of the jury to render a verdict in a civil case has proved to be very satisfactory in your state; and I have the same information in regard to other states where the three-quarter rule obtains.

Continuing, it is familiar that a cause for disagreements among juries and the consequent delay is because the trial judge in America, particularly in most if not all of the state courts, has very little authority in the conduct of the trial. If we are to make the administration of justice popular ,then it is essential that the power of the trial judges shall be rehabilitated so that he can exercise the common law powers of judge and be, in fact, a judge and not, as President Taft once expressed, like "a mere moderator in a religious assembly." As long as the legislatures take from the judges the power to conduct trials as they should be conducted in the interests of justice, and reduce the judge to the status of a mere presiding automaton, then the legislatures are justly charged with much of the blame visited upon the courts.

In the federal courts the trial judge, whenever he deems it proper, has the right to say to the jury how the facts of the case impress him and at the same time must add that his opinion is not binding on the jury. Under the Alabama practice, Code 1907, Sec. 5362, and the same is true in other states where the functions of the court and jury are carefully distinguished, the court may state to the jury the law of the case, and may also state the evidence when it is disputed, but must not charge upon the effect of the testimony, unless required to do so by one of the parties.

One of the reasons for the small number of jury disagreements in England, as compared with our country, is because of the influence of the judge in his charge. The trial judge, by the tendency of the remarks which he makes, has the means of helping the jury to reach a just result; and jurors generally have the good sense and judgment to avail themselves of the judge's sagacity. They realize that the judge brings to his work a mind disciplined by years of study and practice. They appreciate that his knowledge of law enables him to see what facts are to be proved, and on which of the parties rests the burden of proving them, and, so, that as the witnesses deliver their testimony, he may correctly determine its prohibitive value. Practice has taught him to read witnesses. Their words, their manner, their tone, their countenance and even their gestures have force and meaning which the judge immediately notes, and experienced as he is, it will not be often that he is misled or deceived. Surely, as long as the decision on the facts is left to the sole determination of the jury there can be no mistake in allowing the judge to assist the jury in arriving at a true verdict. Such help tends to reduce the number of jury disagreements.

An unsatisfactory feature of our criminal trials, particularly those which attain any degree of notoriety, and a feature which contributes to delay and helps to bring reproach upon the courts, is the manner of selecting a jury. There are on record cases where for eleven weeks the selection of a jury has been dragged out, and in some cases months have been spent in attempting to secure a jury. In the trial of Shea and his associates for conspiracy, seventy-eight days were required to complete the jury and 4,800 veniremen were examined. In contrast with the experience in such cases is the celebrated Crippen murder case in England, less than half an hour was spent in the selection of a jury, while in the equally important trial of Alexander Dickman, in the New Castle Murder Case, the only time consumed was in swearing the first twelve jurors called. It is certainly not necessary in the examination of veniremen to make a microscopic examination of their entire past lives and the lives of their kith and kin. A few simple questions, for instance as to their qualifications and whether they have bias or interest in the case, can be asked and a carefully chosen jury impanelled.

One of the complaints against the administration of justice is the expense that the state itself levies in the form of court costs and fees, which often serve to prevent access to the court. Especially is this true in the justice courts, courts of common pleas and the like, in some of the states. In many of these courts, courts with which the poorer class of our citizens come in contact, the costs in some cases are so excessive as to practically amount to a denial of justice. One of the best ways to make the courts popular is to abolish many of the fees exacted and reduce others until they bear some sense of proportion to the services performed. Thus will the poor have less complaint as to costs.

It is provided by federal statute (Act June 25, 1910, c. 435, 36 Stat. 866, U. S. Comp. Stat. 1918. Compact Ed. Sec. 1626) that any citizen of the United States entitled to commence or defend any suit in the courts of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, writ of error or appeal to any court, unless the trial judge shall certify that the appeal is frivolous and not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after bringing such suit or action, upon filing in court a statement in writing under oath

that because of his poverty he is unable to pay the costs of the suit. In my own state no plaintiff is required to give security for costs unless he is a non-resident of the state. While these rules make it possible for poor litigants to commence and defend suits without the prepayment of costs, the statutes should go further and reduce some of the excessive costs now charged, costs out of all proportion to the services rendered. Then, too, it must be realized that three parties are concerned in the administration of justice, the plaintiff, defendant and the state. The litigants are interested in the maintenance of their rights and the state is interested in seing that the humblest citizen shall receive justice without sale or denial. One of the purposes in the formation of the Union, as expressed in the Preamble to the Constitution, is to "establish justice." That is the great aim of our Constitution and in the establishment of justice it is the duty of the state to make justice as free as the air and to keep the courts of the country open at all times to the poorest in the land that rights may be asserted and enforced with the least practicable delay and cost.

It is a lamentable fact, I think it is a fact, that it is easier to change substantive law than it is to pass a mere remedial measure. Indeed it seems easier to pass a joint resolution to amend the Constitution than it is to enact a statute to authorize modernized procedure. However, Congress has shown in recent years the commendable growing spirit to do what the lawmaking body can do in adapting law to justice. There are among the measures cognate to this the one allowing the court where a suit at law should have been brought in equity, or a suit in equity should have been brought at law, to change the case to the proper side, and authorizing the pleading to be conformably amended and the case heard and not dismissed because the remedy was at law or in equity as the facts determined; and also authorizing the defendant in actions at law to interpose equitable defences by answer, plea or replication without having to file a bill on the equity side of the court, and providing that the review of the judgment or decree entered in such case shall be regulated by rule of court, and whether such review be sought by writ of error or by appeal; and, further, providing that the appellate court shall have full power to render such judgment upon the record as law and justice shall require. And the statute providing that no judgment shall be set aside or reversed or new trial granted by any court in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for any error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire case, it shall appear that the error complained of has injuriously affected the substantial rights of the parties. And, also, there is the act providing that where any suit brought in or removed, from any state court, to any district court of the United States where the jurisdiction is based upon diverse citizenship and such diversity ceases at the time such suit was brought or removed or is defectively alleged, either party may amend at any stage of the proceedings and in the appellate court, upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction; and that thereupon such suit shall be proceeded with as though the diverse citizenship had been full and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal. And again, the commendable efforts of the federal courts to liberalize the rules of evidence to the end that the benefit of the whole truth may be had and justice thereby more certainly ascertained has been aided by congressional enactments; for instance there is the act allowing the jury to compare the handwriting of or signature to a disputed document with the admitted or proven handwriting or signature of the accused. The argument for such statute was, of course, that in ascertaining the exact truth it was better to let the jury have the benefit of all the evidence and to exercise their own judgment rather than be restricted to the opinion of an expert on handwriting.

It may be of interest to say that the legislature in my own state attempted to follow some of the examples set by Congress but that in doing so it is regrettable that it thought to improve upon the language of well considered enactments of Congress; and it is not strange that the attempts were not successful. For instance, the legislature put into the published Acts of Alabama a statute covering three pages or more on the subject of changing a case to the proper side of the court instead of limiting the verbiage to a comparatively few lines. And in changing the rule allowing comparison of handwriting by the jury about twice as many words were employed as are found in the Act of Congress. More than this; the same legislature enacted *mutatis mutandis* the measure advocated by the American Bar Association, to which I have referred, but in doing so added a section providing that the Supreme Court in making the rules to govern procedure should in no wise interfere with any statute on that subject. It is not amazing, therefore, that the Supreme Court of Alabama decided that it was without power to formulate any rules under such act. Doubtless the legislature thought that the Supreme Court could not be relied upon if this power over procedure was vested in it—that the learning and wisdom of that great court was a matter of too much doubt and, therefore, not to be relied on. We remember that even "common law is experience and not logic"[6] and we may add that some legislation may be experience and at the same time is anything else but logic.

Another thing detracts from the proper administration of public justice, and that is the lack of sympathy on the part of some of our people with the courts in the effort to enforce laws the wisdom of which some people do not approve. With the mere wisdom of any law courts in the administration of justice have nothing to do, and it behooves the good citizen, whatever may have been his preconceived notions, to aid the courts in every proper way in its enforcement. It is not right to inculcate disrespect for any enactment even for the purpose of rendering it ineffective so that argument may be made for its repeal. It is equally as unsound to endeavor to render any statute obnoxious by using methods in its enforcement which violate other settled law or even by imposing punishments harsher than the facts in particular cases justify. If a law be not desired the remedy is not with the courts but with the legislative body trusted to represent

6. Judge Holmes' Common Law.

the wishes of the people. I leave to your intelligent thought these truths, obviously applicable in considering some recent legislation. Along with this let me commend the excellent statement of the President, quoted in a recent address by Mr. Daugherty, our distinguished Attorney General, that "No true American will argue that our laws should not be enforced. I refer to laws, no matter of what nature, whether they be those which deal with acts of treason to the United States, threatening the Constitution and the fabric of our social organizaion"; and let me recite the equally good utterances of Mr. Daugherty himself that "when public sentiment has crystalized into law, there can be no question as to the duty of good citizens with reference thereto. They may still debate as to the wisdom of the law, but there is only one course of conduct, and that is obedience to the law while it exists. . . . From the standpoint of the Government, the only sound view is that of law enforcement."

Whatever diversity of opinion there may be about matters which have been discussed, there is the pleasing reflection that the courts, the Supreme Court, and those of subordinate jurisdiction, have been just as faithful as any of the other agencies of our government in carrying out and in securing the purposes for which justice was established by the founders of the Republic. It is a true statement that, "Independent courts of justice protecting the individual from the invasion of his guaranteed constitutional rights, whether by other individuals or by agencies of government itself, are the epoch-marking contribution of the United States to political science. A judiciary made dependent on changes of popular temper or on varying, often contradictory, manifestations of popular will, would become a mere administrative device under the control and direction of the executive power of the moment." This tribute by a distinguished publicist[7] is well applied by him in his forceful sentence, pertinent to the unsolved world questions of this present day, that "The striking service performed by an independent judiciary will offer the best solution of the problems, international in character, that arise out of international business and international rivalries." And let me add that perhaps all the good work of our independent courts of justice can best be continued under the existing plan where every court from the highest to the lowest is empowered under the Constitution directly or by the Congress—Congress constrained always by public policy and restrained, in essential particulars, by the acknowledged limitations upon the legislative power.

You will accord to me no disposition to rail at the times for with you I agree that the present is not worse than the past and that the hope is the future will be better than either. Nor am I deploring tendencies, but my thought is that adequate judicial force should be supplied and adaptable court process should be afforded to the end that public justice may keep footstep with the evident demands.

I leave with you this idea, doubtless your idea, that there should always be unity in the spirit of bench and bar and co-operation of all the ministers of justice—the judges and lawyers. Out of this unity and co-operation there will be earned for the work of courts, for the law itself, a more general respect of the people.

7. Hon. Nicholas Murray Butler.

The Rule of "Stare Decisis"

"In times of public excitement the courts of review should be careful to keep in mind the rule of stare decisis—the doctrine of following established precedents and of adhering to instituted principles," said Judge Orrin N. Carter in an address before the Judicial Section of the Illinois Bar Association in 1921. "This doctrine should not be carried to the extent of allowing to violators of the law a vested interest in rules which have been erroneously sanctioned. (Lanier v. State, 57 Miss. 102, 107.) It is a sound principle that "the doctrine of stare decisis is not applicable to dicta found in opinions of the court." (Friedman v. Suttle, 85 Pac. 726.) The courts of review should not, necessarily, follow the line marked out by a single decision, placing its ruling solely on the ground of stare decisis without regard to the ground upon which the original case was adjudged, (State v. Williams, 13 S. C. 546), for as the Court said in this last opinion, in order that the rule of stare decisis can be forcefully invoked, there must be three elements which enter into the authority of the case, first, the unanimity with which its judgment was pronounced; second, the fact that it has been followed, and third, the duration of time during which it has been openly followed or tacitly assented to. It is but reasonable that wrong decisions in criminal law should be overruled, especially when we find that the wrong is merely malum prohibitum—forbidden by statute. If a man has committed an act which is but malum prohibitum, unless the circumstances are extraordinary, there can be no valid objection to overthrowing a construction of a statute previously laid down contrary to what the statute intended, and especially when there has been but one decision laying down such doctrine; but when an act is malum in se, a different situation is presented. The perpetrator in this last case must have been conscious of his wrong doing; even if the court in such a case laid down a wrong rule with reference thereto, it should hesitate, seriously, before coming to a different conclusion in a later decision. Of course there are no vested rights, ordinarily, in the enforcement of criminal law. The State does not care to punish merely under the doctrine of stare decisis; it does not seek for revenge or to permit the accused to be pronounced guilty under decisions which never should have been the law."

Government by Constitutional Amendment

"If we are to have government by constitutional amendment, let us hope that at least one more amendment to the Constitution of the United States will be made, viz.,—that in addition to a proposed amendment being ratified by the Legislatures of three-quarters of the States in the Union, it shall be likewise ratified by a majority of the electors of the states whose Legislatures have ratified the amendment. Then, and not until then, will government by constitutional amendment be endurable." —From the address of President A. Heaton Robertson of the Connecticut State Bar Association at New Haven, Jan. 10, 1921.

PROBLEMS OF PROFESSIONAL ETHICS

Concrete Instances Illustrative of the Application of Canon Nineteen of the Code of Ethics Relating to Testimony by Lawyer for Client

THE Code of Ethics lays down this principle:

> 19. Appearance of Lawyer as Witness for His Client. When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in Court in behalf of his client.

We lawyers must interpret this, and make our conduct conform thereto. We must, except in formal matters, avoid testifying in cases where we are acting as counsel—and except also in matters in which our testimony is essential to the ends of justice. But occasions arise when an attorney may, or even must, testify in cases in which he is professionally engaged. Judge Metcalf, of the Massachusetts Supreme Judicial Court, states this quaintly:

> In most cases, counsel can not testify for their clients without subjecting themselves to just reprehension. But there may be cases in which they can do it, not only without dishonor, but in which it is their duty to do it. Such cases, however, are rare; and when they occur, they necessarily cause great pain to counsel of the right spirit.[1]

In the application of the above canon, a few concrete instances may prove illustrative.

Suppose you are conducting a foreclosure suit. As to the matter of the amount of a reasonable professional fee, three questions arise: (1) How much work did you do? (2) Was all this work necessary? (3) What is the reasonable value of such work, assuming it to be necessary, at your bar?

It is not easy to see how in ordinary practice any one can intelligently and comprehensively state what professional work has been done, except the man who did it. But before testifying to this, must he withdraw from the case? If he must do so, then the lawyer who takes it up again will in turn be required to withdraw before he will be heard to say what work he has done; and a series of participants in the preparation and trial of such a case is absurd on its face. The profession realizes this; and the writer never heard any objection or adverse comment when an attorney, who has conducted the case, tells what he has done. But as to whether all the work he did was necessary, and as to how much it is worth, the opinion of other lawyers are fully available; and the lawyer in question should, after stating what he has done, refrain from expressing any opinion on (2) or (3) above.

Thornton remarks:

> It is recognized, of course, that there are instances where counsel cannot avoid testifying on behalf of the client, as where facts are so peculiarly within his knowledge that his evidence becomes a matter of necessity in order that justice may be done.[2]

The word "formal" in canon 19 may well be interpreted or explained as equivalent to "uncontroverted," e. g. proof of demand made, service of notice, that a record book of a corporation is lost, and the like.

But it may, of course, happen that evidence which the lawyer expects will be entirely undisputed turns out to be bitterly controverted. In one instance within the writer's knowledge, an unnecessary question in a foreclosure case precipitated a dispute, which in the Master's office, by way of cross-examination, re-direct, re-cross, etc., lasted off and on a couple of years. It concerned the consideration of a promissory note.

The complainant had introduced a note of hand in evidence. The preparation of the case had involved the client in large expense. To hire another lawyer and pay him for studying out the case would have involved the client in heavy additional charges. Assume that, as we have seen often happens in foreclosure cases, complainant's lawyer had identified the note, must he say to his client, "An unexpected dispute has arisen touching the consideration for the note of hand sued on. You must get another lawyer. It will cost you something substantial to prepare the case afresh; but the rules of my profession require me to withdraw as counsel."

Under these circumstances, the least the client could do would be to file an angry protest.

For purposes of comparison, we here note an extreme instance of the application of the general principle involved. Plaintiff's attorney stated on the trial that he had computed interest on plaintiff's claim, was sworn, and over the objection of defendant's counsel, testified to the amount of the interest. The court of review, commenting on the error alleged to have been occasioned by permitting the lawyer to testify, says:

> The remaining error is, that the plaintiff's counsel was sworn to prove a calculation of the amount due on the judgment with interest at ten per cent. Such a practice is very convenient, and aids a jury very much, where the calculation of interest is at all complicated. The jury are not obliged to take the calculation of the attorney though given to them under oath; they can, notwithstanding, make the calculation for themselves. We are not altogether in favor of allowing the counsel for either party to be a witness for his client to prove any fact, but we have no law or rule of practice, as some courts have, forbidding it. We would be better satisfied, that the proof should come from an indifferent party.[3]

The inference seems to be suggested that notwithstanding the fact that the jury, or opposing counsel, may catch him at it—yet, through professional zeal inspired by the hope of a fee, the lawyer-witness may take liberties, under oath, with the multiplication table.

Calculating and proving the amount of interest is a "formal" matter; and is so recognized. The judge who deplored an attorney's doing this had had but limited experience at the bar.

It is "essential to the ends of justice" that a client, by reason of an unlooked-for dispute which has arisen in the trial of a case, should not be burdened with heavy expense in hiring another lawyer.

But this does not obviate—on the contrary, it emphasizes—the need for a careful survey, in advance, of proof necessary to be submitted in a contested case; and the requirement that, if there is any likelihood that the attorney in charge will be needed to testify as to any fact which is at all likely to be disputed, he should take no part in the trial of the case.

RUSSELL WHITMAN.

1. 55 Mass. 519.
2. Attorneys at Law, Sec. 190.
3. 26 Ill. 76.

THE INTER-ALLIED WAR DEBT

Satisfactory Solution of This Perplexing Problem Condition Precedent of Real and Durable Improvement in International Affairs—Concrete Plan of Adjustment Suggested

BECAUSE many attribute our present business stagnation to the non-revival of foreign trade and that, in turn, to the burden of international indebtedness, there is beginning, in this country, a general discussion of whether the United States should take part in some plan for a reduction of such indebtedness by cancellation. THE AMERICAN BAR ASSOCIATION JOURNAL takes no position on the wisdom of any such action by our government or on the merits of any plan which may be proposed. It recognizes, however, the interest of its readers in such questions and the great weight which their opinions carry in their discussion and settlement. When possible, it desires to serve as a channel of information, and a medium for the expression of its readers' views on such matters. The discussion which follows comes from a contributor who desires his name withheld, wishing to have his suggestions considered solely upon their intrinsic merits. It is printed with the belief that readers will find it interesting because of the information which it gives as to the present state of the international balance sheet, because of the concreteness of the proposal made and because of the novelty of some phases of that proposal.

Of the many problems which are preoccupying our economists and business men, the most serious and puzzling is the chaotic condition existing in Europe, and while there is a general feeling of satisfaction throughout the country at the turn for the better of business conditions, we all realize that this improvement cannot continue unless the economic conditions of Europe are bettered and stabilized. To bring about this result, certain fundamental causes for present chaotic conditions must be eliminated. These causes are varied and complex in their nature, but whatever importance may be attached to the political unheavals and to the demoralization resulting from the war, the financial condition in the European countries must be recognized as the principal obstacle in the way of progress. It is well to note that the economic and financial woes of Europe are not principally the result of the physical destruction wrought by the war, however great and important this destruction may have been. In most of these countries, even where the war's destruction was the greatest, this destruction has been largely repaired, factories rebuilt and the land restored to conditions approaching normal. This rapid physical reconstruction has excited the surprise and admiration of American visitors and investigators during the past six months, and it is curious to note that, whilst engineers and agricultural investigators have returned in an optimistic state of mind, financiers, on the other hand, have come back decidedly pessimistic. This phenomenon can be explained by the fact that Europe is suffering less from the physical waste caused by the war than from the well-nigh unbearable burden of war debts which is weighing down the victorious nations.

The depressing influence of these huge war debts —particularly the external debts on foreign exchange, cannot be denied. While it is true that the inter-allied indebtedness has not had any direct effect on the exchange market, inasmuch as no payments on account of this indebtedness have weighed on the foreign exchange market, nevertheless the normal effect must be reckoned with. We can appreciate its importance by noticing the influence on exchange of the proposed moratorium in favor of Germany. Moreover, these inter-allied debts constitute a permanent cause of perturbation as regards the creditor nations as well as the debtors. For the most part, none of these debts could be paid in gold. They would have to be paid in merchandise, the importation of which would have serious detrimental effects in the creditor countries.

We can hope for no real and durable improvement in international affairs until this question of inter-allied indebtedness shall have been definitely and satisfactorily settled. The world is hopeful that following the present Disarmament Conference there will be a conference attended by the leading nations of the world to discuss the vexing problems in economics and finance which are of concern to all the nations. As a preliminary to such a conference, the necessity of some international clearing house ought to receive the thoughtful attention of all the parties concerned. Within the last few weeks there have been many encouraging signs indicating that this trend of thought has already begun, but one difficulty so far has been the unwillingness or inability of the various parties interested to propose any definite and concrete program of adjustment. It is not to be expected that such a program would be perfect, but it might form a basis of discussion which would in turn result in a satisfactory solution of the problem.

With this thought in mind, the following plan of procedure is suggested. This plan, in its present form, is incomplete and open to criticism on several points. On the other hand, it does contain interesting and valuable suggestions and its principal interest lies in the fact that it is a definite and concrete proposal—not dealing merely in generalities of the statement of economic or financial principles.

It is believed that one must start with the premise that no solution of the problem is possible so long as any one of the creditor nations is unwilling to make reasonable concessions. It is assumed that creditors as well as debtors are vitally interested in an adjustment of this inter-allied debt and that all would benefit by such an adjustment. As all of the parties are suffering from existing conditions and would benefit by a solution of the difficulty, it is obvious that all must be willing to make reasonable sacrifices in a common cause. It follows that more should be expected from the richer creditor nations than from the others, but the less fortunate debtor nations must be willing to contribute their part in a measure at least equal to the concessions which shall have been made to them. For example, Great Britain, whose finances are on a sounder basis than the other countries of Europe and who is more directly interested than any other country in a re-establishment of international com-

merce, should take the initiative in this general clearance. It is suggested that Great Britain cancel all of the international war debts owing to her by the Allied nations. This cancellation, however, would be conditional upon a cancellation by each of her debtors of any credits which they may have against other Allied countries, and if the amount of credit cancelled by Great Britain is in excess of the amounts due in turn to her debtors from Allied countries, the difference should be deducted, first, from the debts of such new non-allied and non-enemy states as Czecho-Slovakia and Poland, and, finally, any balance should be credited to Germany on account of her reparation debt.

For example: let us assume that Great Britain would annul the debt owing to her by France, viz., two billion eight hundred million dollars. France in turn would annul her credits first in favor of her Allies. These are in millions of dollars as follows: Belgium, 800; Italy, 10, and Roumania, 220, or a total of 830 million dollars. France would also cancel the debts of Czecho-Slovakia, Poland, etc., which amount to 830 millions of dollars, and the balance 1 billion 170 million dollars would be deducted from the amount of Germany's reparations.

After Great Britain, the United States is, of all the other countries, best able to make an important contribution to any such general plan of cancellation. While the United States is incomparably the strongest financial power in the world today, she is not, however, so directly interested in the affairs of Europe that she could justly be asked for a complete cancellation of the amount owing to her by her former associates in the war. It is suggested, therefore, that the United States should only cancel in the case of governments such as Roumania and Poland, who admittedly are at present unable to make any payment, and that as regards claims against Great Britain, France, Italy and Belgium, these be maintained but reduced by accepting payment at the rates of exchange existing at the time the advances were originally made. Otherwise stated, it seems only reasonable that the United States should make allowances as its contribution for the reduced capacity of payment in the four countries mentioned, and the amount of this reduction in capacity to pay may be best measured by the drop in their respective exchanges. Such a concession on the part of the United States, however, should also be conditioned upon a reduction of the German reparations, in an amount equal to the reduction in the inter-allied indebtedness to the United States effected by the exchange provision above referred to.

The result of this general readjustment, both in so far as the Allied countries and Germany are concerned, will appear from the following table, which shows the amount of reduction by countries and the total reduction of the German reparation:

TOTAL AMOUNT OF REDUCTIONS
(In Millions of Dollars)

By	In Favor of								
	England	France	Belgium	Italy	Roumania	Serbia	Non-allied Countries	Germany	Total
United States	680	1700	220	1210	40	50	300	....	4200
England	...	2800	500	2400	....	....	270	....	5970
France	...	....	600	10	220	....	830	2840	4500
Belgium	...	....	....	....	....	....	....	1320	1320
Italy	...	....	....	....	....	....	....	3620	3620
Roumania	...	....	....	....	....	....	....	260	260
Serbia	...	....	....	....	....	....	....	50	50
Total	680	4500	1320	3620	260	50	1400	8090	

N. B.—In the case of Italy the total of her cancellations may be in excess of her share of the German indemnity, but this does not materially affect the method of clearance shown by this table.

The German debt, it is seen, would by this plan be reduced by approximately eight billions of dollars, which would reduce Germany's bill for reparations to approximately one hundred billion gold marks, the exact amount advocated by the United States representatives at the Paris Conference. All the other inter-allied government debts resulting from the war will have disappeared, except the debts owing to the United States by Great Britain, France, Italy and Belgium. These debts would have been reduced by the adjustment above indicated and would then be roughly as follows:

Great Britain.....3 billion 500 million dollars
France .....1 billion 250 million dollars
Italy ..... 430 million dollars
Belgium ..... 150 million dollars

making a total of 5 billion 330 million dollars.

It is readily conceivable what a salutary influence such a general clearing would have upon the revival of international commerce, as well as on the political relations between the various peoples concerned.

Alabama's Modern Judicial System

"We have today the most modern judicial system in America, because there is absolutely no other State in the Union which gives the right, so far as I know—until recently at least, I am positive—the right to the Chief Justice to send all the judges to one point in the State if necessary to get the work done there," said Mr. Henry Upson Sims, at the last meeting of the Alabama Bar Association. "Further than that, there is no other court in America that compares to the Birmingham Circuit Court, because there is no other court so nearly modeled to the English court that has like jurisdiction."

ASSOCIATION OF AMERICAN LAW SCHOOLS

Nineteenth Annual Meeting, Held at Chicago, Elects McGill University, Montreal, and Catholic University of America to Membership, Listens to Addresses, and Discusses Pertinent Questions in Series of Twelve Round Table Conferences

A CONSIDERABLE variety of meetings made up the Nineteenth Annual Convention of the Association of American Law Schools at the Hotel LaSalle, Chicago, December 29, 30 and 31, 1921. The Association consists of fifty-three law schools scattered throughout the United States. A departure at the last meeting in electing the Law School of McGill University, Montreal, to membership has launched the Association on an international career. The schools of Canada have wavered between the older English model of societies for legal education and the American type of law school. In addition, they have carried something of the continental tradition of faculties of law by reason of the prevalence of the ideas and institutions based on Roman Law in the French-speaking parts of Canada. On the whole, the school at McGill which is now a member of the Association seems to approximate the law school of the United States more closely than do any of the other Canadian Schools. One other school was elected to membership—the Law School of the Catholic University of America, Washington, D. C.

Forty-eight of the schools in the Association were represented at the convention. In several cases practically the entire full time faculty was present. The large and vigorous delegation from one of the eastern schools must have been a gratifying indication to the presiding officer of the esteem in which his colleagues hold him. In addition, there were representatives of several schools not members of the Association, to whom were extended the courtesies of the floor and other privileges of the convention. This broad-minded action of the Association by a resolution adopted in the course of the Convention has now become the fixed policy of the Association for future meetings. In general, the important questions before the Convention were dealt with consistently with this policy. Thus the Association laid on the table a resolution introduced by the Executive Committee which tended to discriminate perhaps a little too sharply against schools not members of the Association in the matter of advanced standing to be accorded to their students upon transferring to other schools. The purport of the report submitted on the subject of classifying law schools which was approved by the Convention was that the work of classification should not be undertaken by this organization. In other words, the Association of American Law Schools recognizes as its purpose the advancement of legal education, not its control.

It was fitting that the meeting devoted careful attention to the opinions of other bodies, bodies of laymen as well as of lawyers, on the problems of legal education. The president's annual address discussed the recent action of the American Bar Association at its last convention in recommending the raising of standards throughout the country and the report of the Carnegie Foundation for the Advancement of Teaching made as a result of its ten years' study of legal education in this country. It was fitting, too, that the Convention called upon Mr. Alfred J. Reed, the author of the Carnegie Foundation Report, who was a visitor, to take part in the discussion of the president's report. Mr. Reed stated very clearly his points of difference with the Root Committee on the question of a unitary bar. He stated that he could not see how it was possible to escape from the development of a dual profession consisting of an inner and outer bar. Still he was not at all dogmatic but willing to watch the outcome in which he seemed to think that the attitude of the Bar Association and of lawyers in general might be a potent factor. He was very attentively listened to and even before he spoke, a number of questions were directed to him. In his avoidance of "dialectics," however, he showed himself a master dialectician as well as an indefatigable gatherer of facts. He remained throughout the Convention and freely discussed the affairs of each school with its representatives.

Most of the open meetings were devoted to routine matters. Aside from the presidential address and that of the representative of McGill on legal education in Canada, the only formal paper announced was one by Judge Benjamin N. Cardozo of the Court of Appeals of New York. Under the caption, "An Institute of Law," he developed another phase of the ideas which he had expressed in a recent number of the Harvard Law Review on a ministry of justice, namely, the need of a more systematic process of keeping the law up to date. Hon. Orrin N. Carter of the Supreme Court of Illinois was also invited to address the whole Association.

The papers by the representatives were thus scattered among the several sections to a much greater extent than in any previous meeting. Nine of these sections met in twelve round-table conferences. A score or more formal papers were read, most of which, to judge by the experience of last year, will probably appear in the Law Journals in the near future. Although the sections and round tables are supposed to be organized along uniform lines, those who attended them were struck by the great diversity of forms that the experiment has taken on. In the first place, the councils which were elected last year to conduct the affairs of the several sections differed among themselves in size, in internal organization, in the tenure of office of their members, and in having or lacking a division of function among the members with reference to the particular branches of their subjects taught in the law schools. Aside from the actual difference in the terms and conditions for which they have been elected, and the like, there developed this year even a greater difference in policy. Most of them seem to have assumed the desirability of rotation in office and the bringing in of new blood. A few, however, have kept their officers from the very start without a change. In some, the papers were given

by the members of the council, while in others the council studiously avoided taking part in the program.

The greatest difference developed in what the sections attempted to do.* There were at least four distinct types of discussions: First, the simple discussion of difficult points, as illustrated in some of the papers in Conflict of Laws, Business Associations, Wrongs, and Commercial Law. The first of these, under the presidency of Professor Beale, is necessarily a return of a number of his older students to a seminar session. It was enlivened this year by the injection of an independent tradition represented in a few of the schools. The session in Commercial Law cleverly grouped the points to be discussed by proposing a single question likely to come up in any of the "commercial law" courses. And the discussion consisted of the various solutions of the problem offered in the law of sales, in the law of bills and notes, in the law of insurance, and in the law of admiralty. This conference was particularly successful and illuminating. Those in charge of it for next year plan to discuss the various instrumentalities presented by the law for a particular business need, much as is being done in the newest textbooks on business law.

A second type of question was that dealing with new developments in the law, the new international court, for example, in the section on International Law, and the appearance of no-par-value stock in the section on Business Associations. Twenty-two states have adopted such a provision since 1913, and it has been up for consideration before the commissioners on uniform state laws.

The third type of question has to do with improving the law. The Property session was devoted to the problem of simplification through statutes. In Municipal Corporations there was a general agreement that cities should be more generally held liable for acts on the "governmental side." In Public Utilities one of the topics was the desire of a new instrumentality for the more efficient regulation of public service enterprises and the latest experiments in that direction. Another was the imperative need of a more definite system of valuation of public utilities. In Remedies, the theme was reforms in the law of evidence. In "Wrongs" there was an able discussion of the need of bringing the legal conception of insanity within the bounds of modern psychology.

The fourth type of question was concerned with purely pedagogical difficulties. Such questions as where this or that should be taught; international law, for example, or the business trust, or equity of redemption, or legal bibliography. Sometimes the question was how it should be taught, as when Dean Wigmore in the section on Wrongs elaborated his tripartite division of torts originally put forward in the eighth volume of the Harvard Law Review. An interesting session of this fourth type was that of the section on Legal History, one of the best attended at the Convention. The speakers were by no means unanimous as to the proper content of such a course or its exact place in the curriculum. The principal paper presented proposed a rather intensive study of a few topics, as illustrative of the growth of law. Most of those who took part in the discussion wanted at least a broader field of Legal History to be brought into the curriculum, and some described a course more comprehensive than any that the expression "Legal History" would in itself suggest.

The conference on the conferring of a doctorate instead of the degree of Bachelor of Laws on students holding the A. B. degree brought out the information that at present half a dozen schools confer the degree of J. D. on students who spend at least six years on their academic and legal course, devoting at least the last three of these to law. The Convention recommended that this be the minimum requirement hereafter for the degree of J. D. Higher research degrees in law, such as S. J. D. and D. C. L., were discussed by the Conference, but it was found that the present diversity in this regard was too great to permit of the recommendation of any particular course of action.

In view of the difficulty of arriving at uniformity even in such general matters as these, one may imagine the consternation caused by a simple request addressed to the Convention by a legal fraternity then in session in the same hotel: that in order to facilitate the awarding of a cup for scholarship, the schools of the Association should adopt a uniform system of marking grades! The matter was referred to the incoming executive committee.

Other business referred to that committee includes the recommendation of the establishment of a juristic center, the report of the committee on recruiting the teaching branch of the profession, and an elaborate report of the committee on curriculum.

The officers for the coming year are: President, Dean James Parker Hall of Chicago; Secretary-Treasurer, Dean Henry Craig Jones, University of Illinois; Executive Committee: Dean George Gleason Bogart of Cornell, Dean Thomas W. Swan, of Yale, and Professor Larrimer of Tulane University.

The luncheons as usual were a pleasant feature of the Convention. At one of them Mr. William Draper Lewis detailed the plans of the Conference to be held in Washington pursuant to the recommendations of the Root Committee, to bring about the help of state bar associations in raising the standards of legal education. The annual banquet was turned into something of a farewell dinner to Eugene Gilmore, a former president and for many years secretary of the organization. He will leave shortly to become the Vice-Governor-General of the Philippines. A feature of the banquet was the singing of Professor Hector G. Spaulding of George Washington University to the accompaniment of Dean Wigmore. His rendition of the street song from the Barber of Seville left the impression that the law, always known as a jealous mistress, has robbed opera of a star.

NATHAN ISAACS,
University of Pittsburgh Law School.

*The fact that three or four of these "round tables" were held at the same time made it impossible for any one representative to attend them all. I am indebted to my colleagues, Dr. Judson A. Crane and Dr. George J. Thompson, for accounts of those which I was compelled, often reluctantly, to miss.

A Cabinet Reunion

A unique feature of the dinner given by the Chicago Bar Association on Dec. 27 in honor of Chief Justice Taft was the presence of three former members of his cabinet: Walter L. Fisher, Secretary of the Interior; Wayne MacVeagh, Secretary of the Treasury, and Jacob M. Dickinson, Secretary of War. All are residents of Chicago. Judge Dickinson made an address.

CURRENT POLITICAL AND ECONOMIC REVIEW

THE industrial phenomena of the falling price cycle through which we are just passing are bringing with them a reconstruction and a re-emphasis of many economic ideas. For some years the dearest wish of many enlightened labor leaders was to secure the recognition of labor's right to a wage adjusted to the cost of living. No sooner had this conception become widely disseminated than labor began to see in it a dangerous boomerang. It endangered labor's demand for an increasing standard of living "by chaining it to an index number" on the one hand, and served as an excellent argument for reducing wages during a time of declining prices. The Executive Council of the A. F. of L. reported to the Convention at Denver in 1921 that "The practice of fixing wages solely on the basis of the cost of living is a violation of the whole philosophy of progress and civilization, and furthermore is a violation of sound economic theory." A discussion of this matter based on the experience of the printing trades in Chicago appeared in the December number of the *American Economic Review*. Mr. F. H. Bird, who wrote the article, served for some time as consulting statistician for the Franklin Division of the Franklin Typothetae of Chicago. His conclusion is:

> No system of wage adjustment can be successful over a period of time unless it recognizes the fundamental principle of payment for results. One reason for the open shop movement in the United States is the protest of the employers against restriction of output with its excessive cost of production. Would it not be a constructive step on the part of trade union leaders to permit the adoption of production standards as part of the collective bargaining process, these standards to be arrived at on the basis of investigation of scientific production results?"

A report from New Zealand appearing in the *Economic Journal* for December is of interest to the United States because of its bearing on the Kansas Compulsory Arbitration experiment. Professor J. B. Cunliffe of Canterbury College, New Zealand, writes of "Wage Arbitration in New Zealand under falling prices." A summary of the record of the court tends to show that real wages have not been raised by the court. The requests to cut wages have been favorably acted on by the court, resulting in a great furore in the ranks of organized labor. One of the justices of the court (representing labor) resigned and "there is an active minority of the labor movement which views the court as a mere capitalistic device."

It is not safe to risk any bold generalization, but it would appear that since New Zealand is primarily agricultural in its make up and since unemployment reigns, New Zealand labor would have as much to gain by holding loyally to the court as by attempting to strike. These months are critical for the success of the court method of settling industrial disputes.

The activities of the Indian Nationalists against Great Britain are coming to the attention of the world in dramatic fashion. Taraknath Das of Calcutta, India, discusses the "Progress of Non-Violent Revolution in India" in the *Journal of International Relations* for October. He dates the Indian movement from the industrial demoralization of 1905. The revolution has been under the leadership of M. K. Granhi, who is concerned with building "a state within a state." Indian Courts are meting out justice. The government is supported by optional financial assistance. "The boycotting of British goods and the reviving of Indian industries are progressing so swiftly that the Lancashire merchants are in distress and over 600,000 operatives of cotton mills of Lancashire are now out of employment." Voluntary militia units are organizing. A trade union movement is approaching the five million mark. Many districts have refused to pay British taxes and stoically put up with violent measures to enforce collection. The moral aspects of the nationalist appeal are apparent when one remembers that opium shops are being swept out of existence.

In striking contrast to the moral unity of the Indian peoples is the situation in China, revealed by Henry F. Merrill in the *Political Science Quarterly* for December. The picture is so black that his final word is:

> Let the students of all the Provinces cooperate, and working with and through the leaders of the gentry, and of the agricultural and industrial elements of the population in every district, influence and control the election of the members of the New Parliament. Let them discourage . . . bribery and corruption. An individual appeal to every authorized voter would not, perhaps, be an impossibility. There is reason to believe that such a movement is coming. If it fails, the temporary effective intervention in government by a commission of the foreign powers is the only apparent resource.

A summary of the proceedings of the Arms Conference to date appears in the January, 1922, Current History supplement of the *New York Times*.

The *Economic World* for December 31, 1921, contains a criticism of the proposals for the extension of credit to European states on the theory that credit is needed to revive British trade. The author thinks British prices are "impossible."

The literature relating to the "British Building Guilds, and experiment in Industrial Self-Government" is reviewed by G. V. Cox in the December *Journal of Political Economy*.

WILLARD E. ATKINS.

University of Chicago.

Death of John E. Greene

With regret the Bench and the Bar of the State received the report of the recent and sudden death of John E. Greene of Minot, N. Dak. For some time he had been Secretary of the State Bar Association; previously he had been its President. He was always interested in promoting the welfare of the State Bar Association and, largely through his advocacy of incorporating the state Bar and the giving to it powers somewhat similar to the law societies in Canada, he was instrumental in suggesting, and thus procuring, the passage of the statutory act in 1921 incorporating the State Bar Association and making every practicing attorney, by legislative act, a member thereof. For many years he had been a member of the American Bar Association, at one time being a member of the General Council. For years he was recognized by the Bench and Bar of this State to be one of the leading lawyers in the State.

H. A. BRONSON,

Justice of the Supreme Court, Bismarck, N. Dak.

ACTIVITIES OF STATE BAR ASSOCIATIONS

Secretaries of State Bar Associations are requested to send in news of their organizations. "News" means not only official statements of time, place and programs of regular meetings and the action there taken, but also reports of other interesting activities. In brief, anything showing what the membership, committees and leaders in the State Bar Association are thinking and doing with respect to matters of professional interest.

Secretaries can help to make this department one of the most interesting in the Journal. The collection of reports will enable each State Bar Association to see every month what the others are doing and to avail itself of any suggestion contained in their activities. Contributions should be mailed not later than the 25th of each month and should be addressed to the editorial office, 1612 First National Bank Building, Chicago.

ALABAMA

Delegates to Legal Education Conference Appointed

Hon. W. O. Mulkey, President of the Alabama State Bar Association, has appointed the following delegates to the Conference on Legal Education to be held in the City of Washington, D. C., February 23 and 24, 1922: Hon. Benj. P. Crum, Montgomery; Hon. Forney Johnston, Birmingham; Dean A. J. Farrah, University of Alabama.

The following alternate delegates were appointed: Col. Chas. S. McDowell, Jr., Eufaula; Hon. J. K. Dixon, Talladega; Hon. A. R. Powell, Andalusia.

The Executive Committee of the Association will have a meeting in the city of Montgomery on January 12 to fix the time and place of the next meeting of the Association, select some distinguished non-resident attorney to deliver the Annual Address before the Association at its meeting, invite certain members of the Association to prepare papers to be read before the Association and transact such other business as may be thought necessary to insure a full attendance of the members at the meeting of the Association.

ALEX. TROY, Secretary.

FLORIDA

Efforts to Organize and Regulate Bar by Legislation to be Continued

Plans for the 1922 meeting of the Florida State Bar Association were discussed at a meeting of the Executive Council held in Jacksonville, January 4. The meeting will be held in Orlando, Florida, June 15, 1922. It was decided not to limit the time of the meeting to two days, as has heretofore been the custom. It has been found by experience that oftentimes important matters are slurred over because of the haste necessitated by the two-day limit established. At the 1922 convention the question of adjournment will be left to the pleasure of the members attending the meeting. All the Judges in the State will be requested to recess their Courts the week of the meeting so as to permit a large attendance by practicing attorneys.

The Secretary was instructed to call on the chairman of the various standing committees for reports to be submitted not later than thirty days prior to the annual meeting. These reports will be printed and mailed to the members before the meeting so that they may be studied and digested at leisure.

The President was authorized and directed to take up with the chairman of the Judiciary Committee of the United States Senate the urgent need of an additional Federal Judge in Florida. A bill providing for such relief has been passed by the House of Representatives and is now before the Senate Judiciary Committee.

The Council decided to continue its efforts to organize and regulate the Bar by legislative enactment. A bill to such effect was approved at the 1921 meeting and was passed by the Florida Senate. It was not reached by the House prior to adjournment due to press of business. Every effort will be made to have this bill passed by the 1923 Legislature.

The Secretary reported that as a result of the membership campaign which the Association has been carrying on one hundred and twenty-nine new members have been secured. This brings the total membership up to five hundred and sixty, or more than fifty per cent of the practicing attorneys in the State. The drive for new members will be continued and it is hoped to enroll all the attorneys in Florida before the next annual meeting.

HERMAN ULMER, Secretary.

KENTUCKY

Association Opposes Calling Constitutional Convention

The President of the Kentucky State Bar Association has appointed the following delegates to the Conference of Delegates to be held in Washington in February: W. W. Crawford, Louisville; Atilla Cox, Louisville; J. Verser Conner, Louisville.

At the last meeting of the Kentucky State Bar Association the President was directed to appoint a Committee to consider the advisability of calling a Convention to revise the present State Constitution. That Committee was appointed and met and a special meeting of the Association was called to be held in Louisville on December 28th, at the same time that the Commonwealth's Attorneys Association and the Circuit Judges Association met.

On the 28th the Committee reported and it was opposed to calling a Convention to revise the present State Constitution. The question of adopting or rejecting that report was debated during the entire morning session on the 28th, and in the afternoon the debate was continued. By a vote of almost two to one the Convention went on record as opposed to calling a Constitutional Convention. In other words, it adopted the report of its Committee. The proposition excited a great deal of interest.

On the evening of December 28th a joint banquet of the Louisville Bar Association, the Kentucky State Bar Association, the Circuit Judges Association and the Commonwealth's Attorneys Association was held at the Seelbach Hotel. Mr. John Davis, of Louisville, presided as toastmaster,

and Mr. Province M. Pogue, President of the Cincinnati Bar Association, Mr. H. B. Mackoy, of Covington, Mayor Huston Quin, of Louisville, and Judge William Rogers Clay, of the Court of Appeals of Kentucky, spoke.

J. VERSER CONNER, Secretary.

MARYLAND

Annual Report of Bar Association Just Issued—Contains Interesting Addresses

The Annual Report of the Maryland State Bar Association for the year 1921 has just been issued and contains the daily proceedings of the Association as well as the addresses made by the invited guests. These addresses were more than of local interest and should prove to be helpful reading to attorneys throughout the country. The address of the President of the Association, James E. Ellegood, discussed several general political evils; that of Judge John C. Rose, of the United States District Court for the District of Maryland, analytically dealt with the "Difficulties in the Way of Ascertaining the Will of the People, as to Men or Measures;" that of Alexander Armstrong, Attorney General of Maryland, dealt with the importance of the office of Attorney General in the States of the Union and the wisdom of keeping it an elective office rather than making it an appointive one; that of Forney Johnston, of Washington, D. C., dealt with "Certain Modern Aspects of the Police Power" and carefully analyzed what he considered to be an abdication of the judicial function in favor of the Legislature itself, whose action is under review by the Court, as well as the substitution of the test of social economics and comparative legislation of other countries for the conclusions of the Judge. Mr. Johnston particularly referred to the "Rent Cases" decided by the Supreme Court of the United States in the Spring of 1921. That of Frank W. Grinnell, Secretary of the Massachusetts Bar Association, dealt briefly with the history of "Some Early Lawyers of Massachusetts and Their Present Influence in the Life of the Nation," naming James Otis, Thomas Allen, John Adams, Theophilus Parsons, and William Cushing; that of Philip P. Campbell, Chairman of the Committee on Rules of the House of Representatives, dealt with "The Citizen and the Constitution," and emphasized the multiplying of the activities of the Government in matters foreign to its original purposes.

The Association also considered the incorporation of the Maryland State Bar Association in accordance with the "Uniform Act" prepared by a Committee of the American Bar Association, and finally concluded that it would not be wise to adopt this Act at the present time. It also considered the practicing of law by Trust Companies and the organization of a State judicial system along lines suggested by the Judicature Society.

Judge Henry D. Harlan, Sylvan Hayes Lauchheimer and James W. Chapman, Jr., have been appointed delegates to attend the special meeting or Conference on Legal Education to be held in Washington, D. C., in February.

JAMES W. CHAPMAN, JR., Secretary.

MICHIGAN

State Bar Association Issues Journal

The first issue of the Michigan State Bar Journal, the organ established by the association in accordance with a decision taken at the last annual meeting held at Flint, June 3 and 4, came out in November. The issue contains a foreword giving the genesis of the enterprise. It states that what seemed very simple when presented to the association for authorization turned out to be extremely difficult when taken up by the officers for definite execution. "A study of the experience of other states," it continues, "and particularly of the experiment of the Massachusetts Bar Association with a similar enterprise, convinced the officers and directors that a successful Bar Association organ could not be maintained unless it contained a considerable variety of legal material. Something more than a mere medium for dissemination of Bar Association proceedings and news, and a range of subjects wider than mere questions of Michigan law, seemed essential. In other words, a journal which would be able to meet the requirements of an exacting learned profession would have to be both a Bar Association organ and a general legal magazine."

The statement adds that the Law School faculty of the University of Michigan, under whose auspices the association voted to issue the new periodical, offered a solution of the difficulty. This was to allow the Michigan Law Review, the general legal magazine published by them, to be reprinted and used in combination with a new journal, which should confine itself to matters relating to the Michigan Bar Association and to Michigan laws—the combination to go out to all members of the State Bar Association. This plan was finally adopted by the officers and directors of the association. It called for eight issues, from November to June, inclusive, instead of the four each year which the association had contemplated, but this seemed a mere mechanical variation. The editorial work will be done under the direction of the Secretary of the Michigan State Bar Association.

The November issue presents a very imposing appearance and, with its varied contents and excellent mechanical workmanship, seems fully to justify the decision of the officers.

MISSOURI

Delegates To Legal Education Conference

The Missouri Bar Association has appointed the following men to attend the conference on legal education to be held in Washington during the month of February: Mr. Murat Boyle, Grand Avenue Temple, Kansas City, Missouri; Mr. James P. McBaine, School of Law, Columbia, Missouri; and Mr. H. E. Sprague, Third National Bank Building, St. Louis, Missouri.

KENNETH C. SEARS, Secretary.

NEBRASKA

Report of Committee on Bar Organization Postponed—Large Increase in Membership

The Nebraska State Bar Association held its twenty-second annual meeting at Omaha, Dec. 29 and 30. The address of President Alfred G. Ellick of Omaha summed up ably what the Association had accomplished during past years. The address of Judge Kimbrough Stone, of the United States Circuit Court of Appeals, was an unusually strong demand for the enforcement of law, couched in a style remarkable for its clear incisiveness. Senator

Beveridge delivered an address on "The Development of the United States Constitution Under John Marshall," which was able, eloquent and informing. Prof. L. H. Foster of the College of Law, of the University of Nebraska, took as the subject of his address, "Some Pitfalls of Nebraska Real Property."

The Committee on Bar Organization appointed at the last meeting made a report, in which it endeavored to remove objections which had been made to the bill for the organization of the State Bar proposed at a previous meeting. The bill which this committee presented did not attempt to leave final action in the formulation of rules of professional conduct and in relation to the requirements governing admission to the Bar of the State to the Nebraska Bar Association, but provided that this organization should simply make recommendations to the Supreme Court. Certain designated representatives were given authority to institute and prosecute proceedings for the misconduct of any attorney, the Supreme Court to pass upon the case. After considerable discussion the report was indefinitely postponed.

The joint report of the Committees on Legislation and Judiciary pointed out five recommendations sponsored by the Association which the Legislature had adopted, namely: providing for verdict by five-sixths of the jury in civil cases; judgment in criminal action not to be reversed or affected by reason of any error not affecting the substantial rights of the defendant; recognizance in criminal cases made continuous from term to term until final judgment; jurisdiction of district judge at chambers increased; establishment of state custodial farm for first offenders.

The Committee on Legal Education recommended that the resolutions of the American Bar Association, adopted at the 1921 meeting, concerning requirements for admission to the Bar be adopted. This report was laid on the table until the 1922 meeting, in anticipation of the session of the Legislature in 1923. The Committee on Inquiry reported that eight complaints had been made to it, which had been variously dealt with. In two cases the committee had made an investigation and report, which had been forwarded by the executive council to the Supreme Court. This tribunal recently directed the Attorney General to institute disbarment proceedings.

At this meeting one hundred and seventy-three new members were admitted to the association.

The following officers were elected for 1922: President, George F. Corcoran, York; Vice-Presidents, Wm. V. Allen, Madison; C. L. Richards, Hebron; J. G. Mothershead, Scottsbluff; Secretary, Anan Raymond, Omaha; Treasurer, Raymond Crossman, Omaha; Executive Council for three years—James A. Rodman, Kimball.

OHIO

Program for Mid-Winter Meeting

The mid-winter meeting of the Ohio State Bar Association is to be held at Akron, Ohio, Friday and Saturday, January 27 and 28. The speakers are: Eugene MacQuillan of St. Louis, who will deliver an address on the subject of Municipal Corporations; George E. Reiter of Sandusky, Ohio, who will speak on Community Property as Between Husband and Wife; United States Senator Joseph Taylor Robinson of Arkansas, and Congressman Simeon D. Fess of Ohio, the subjects of whose addresses have not yet been announced.—J. L. W. HENNEY, Secretary.

LETTERS FROM BAR ASSOCIATION MEMBERS

An International Air Code

Denver, Col., Dec. 15, 1921.—To the Editor: The disarmament conference met with a new world to set in order. It confronted conditions never yet confronting any conference of nations. No longer will questions of sea power in ships, of mere naval superiority, occupy the minds of statesmen—they must look to the air where future mastery lies.

If we admit this fact—and recent demonstrations seem to prove it, at least potentially—we must admit that the nations must enter a new domain of international law—the law of the air. There must be an international air code. It must be a code both for peace and for war. It must define the routes, map out the areas, limit the flying zones and declare the rules of international flying.

The conference ought to do more than to consider the deadly side of air craft—it ought to take steps to define the lawful limits of flying over any foreign nation and prepare the various countries for the development of peaceful commerce and intercourse in the air as well as on land and sea.

We are indebted to that brilliant English writer, Mr. H. G. Wells, for the first impulse to consider carefully this matter of internationalizing air craft. In a recent article he insists that England is about to be marooned and isolated through the legal inability of her airmen to fly over any other country, and he brings this principle to bear on a future world state that may end war. But when he comes to consider the relation of England to such a World League and to future world arrangements and the effect of air traffic upon British supremacy Wells strikes a clearer note and in that brilliant and prophetic style which has charm because it is such a curious mixture of reality and vision he writes a fascinating chapter. He finds the existence of sovereign nations in Europe an insuperable obstacle to the future of Britain in the air, or even in any form of human intercourse. "You cannot get out of Britain to any point of the empire, unless perhaps it be to Canada, without crossing foreign territory," Wells tells us. And we look at the map. He is right if the plane must travel as the crow flies. England is rather "bottled up" to use Ben Butler's famous phrase. But if the planes fly over sea routes England has as much free egress as almost any nation and can fly anywhere. Whether planes will need to use land routes or can stay on sea routes is something no one can now determine. We must go to the plane factories, to obscure inventors working in machine shops, for an answer to the question.

But Wells' suggestion involves one obstacle to continental air traffic that must be reckoned with

in the near future by some international convention —the formulation of international air rules, or an international law of the air.

Wells states the legal principle correctly. Each sovereign nation is precisely like an individual land owner: it owns the soil within its boundaries to the center of the earth and the space above, within vertical planes, to the sky. An entry of a plane at any height over a nation is a trespass upon the rights of that nation and a technical violation of its sovereignty. Take Switzerland for example. The Swiss nation owns within its boundaries precisely what an Illinois farmer owns in his 160 acres of land; it owns the land, its surface, and all the space beneath and above, included within imaginary vertical planes extended indefinitely upward and downward. A British aviator who tries to fly to Persia over a land route would violate the sovereignty of possibly France, Italy, Greece and Turkey. No matter at what height his plane flew and how silently he slipped through the upper air, he is crossing international boundary lines and national domain and is trespassing upon the territory of other nations.

Wells is quite right in declaring that a Federalized Europe would remedy this state of affairs, and if he can persuade the nations of Europe to Federalize and permit British aviators to pass at will over their land, he will have earned the right to a resting place in Westminster Abbey. But we must consider another point—landing rights. No matter what view we entertain of the dubious and technical trespass of flying over a nation's domain at say, 20,000 feet up, there can be no doubt that a landing upon the soil of a nation is a possible violation of national rights and such right is subject to the sole regulation of the sovereign nation where the landing is made.

What is obviously needed is, first, a new international air code providing that above a certain height, say 10,000 feet, a passage over a nation by aeroplane shall not be considered a trespass or a violation of national rights; and second, nations must agree upon reciprocal landing rights and there must be internationalized landing stations. These could be directed through a mandate and internationalized, much as cable or coaling stations may now be internationalized.

When an aeroplane is flying over the sea the rule will be different, for there is no sovereignty over the seas and the freedom of the seas means a similar freedom in the air over the seas. Here the planes of the future can fly unmolested by national boundaries or conflicting national rights. Mechanical and inventive genius will determine whether sea routes will become common and important. If we can believe half we read, the sea routes will be almost universally used; flying across the Atlantic will be a matter of hours and "the freedom of the air" will be a leading phase in international aviation law, bringing new amity to our international relations and spelling peace in new ways to the warring sons of men.

We may look, therefore, for an early development of international law and for its consideration by our statesmen and international leaders. Mr. Wells has here suggested an important and significant theme that will some day fill the minds of men and about which whole libraries will be written. Five hundred years hence some new Justinian will codify the International Aviation Law. Let us hope that no future Prussianized power will make of this air code a mere scrap of paper, but when law has reached so elevated a plane that the international code of ethics will be equally as exalted and men shall learn war no more.

WAYNE C. WILLIAMS.

Fairchild vs. Hughes

New York, Jan. 5.—To the Editor:—Prof. Ernst Freund's article on the proposed Woman's Rights Amendment interfering with the municipal laws of the states (the natural and inevitable result of first taking from the people of the states the right to determine their own suffrage) is interesting, but it seems to overlook the fact that the Supreme Court has held that Congress could not make a "municipal code for the States" and emasculated the language of the 14th Amendment expressly directed to that end. (See Civil Rights Cases 109 U. S. 3.)

Secondly, is not this whole business a little premature? Would it not be the part of wisdom to await the answer of the Supreme Court to Mr. Everett P. Wheeler's claim that the Suffrage Amendment is illegal because "Article V was provided for changing, limiting, shifting or delegating powers of government?" . . . It was not established to amend, abolish, destroy or limit in any way the sovereignty of the people, i.e., to determine who shall constitute "the people"; "that changing the Sovereign Power is not an end or purpose of the Federal Government"; and that

> The power of the Amending Agents is necessarily limited to the Federal grant which did not include the right to grant or withhold suffrage, the determination of who shall exercise the sovereignty of the people.

That proposition is difficult to answer as also is Mr. Wheeler's further claim that:

> Appealing to stranger legislatures (perhaps 3,000 miles away) whose opinions we can neither influence or affect, because they are not responsible to us, to relieve us from obnoxious suffrage rules affecting our right to vote is most emphatically not a political remedy. It, by no stretch of the imagination, can be called self-government. It is the slave's petition to irresponsible power. Likewise the imposition upon us of such unchanging suffrage rules is not an orderly, responsible democratic process of government.

It seems that answers to these searching propositions should be had from the Supreme Court, if reasoned answers are possible, before we plunge into more "irresponsible government by Constitutional Amendment."

This is the issue which Mr. Wheeler's brief in the case of Fairchild vs. Hughes, to be argued on January 9, presents to the Supreme Court for determination.

We had better wait to see whether or not the Supreme Court will hold this is still an "indestructible Union of Indestructible States" which cannot be destroyed by outside dictation of their suffrage, and whose "suffrage in the Senate," necessarily voiced through electors of their own selection, is made perpetually safe from Federal Amendment by Article V itself, before venturing further usurpation along this line.

GEO. STEWART BROWN

American Branch of International Law Association

MANY of the members of the American Bar Association will recollect with pleasure its Annual Meeting in the year 1907, held at Portland, Maine. At that meeting, the International Law Association was, by special invitation, holding its Annual International Conference in this country. Older members will perhaps recall a similar conference held at Buffalo in 1899. The acquaintances established between members of the bar of this country and their colleagues of Great Britain and the Continent of Europe which these meetings afforded were much appreciated at the time.

During the past decade branch associations or national sections of the International Law Association have been organized in a number of countries to increase the coöperation between the parent Association and the members of the national or local bar associations. With a similar end in view, the American Branch of the International Law Association has been recently organized to increase participation within the United States and Canada in the important activities which have made the parent Association so well known, not merely in the field of public international law and diplomacy but also through its work in preparing draft laws and uniform contract provisions for international trade and commercial relations and in the unification of the law of negotiable instruments.

The International Law Association was founded in 1873 at the suggestion of Elihu Burritt, initiated by Dr. Miles and supported by many distinguished members of the American Bar, chief among whom was David Dudley Field, draftsman of the Civil Code of New York and of a Code of International Law. Among other distinguished American lawyers and publicists who took an important part in the early activities of the International Law Association were Senator Charles Sumner, President Woolsey of Yale, President Barnard of Columbia, Judge Emory Washburn of Boston, Judge Charles A. Peabody of New York, Hon. Reverdy Johnson, F. R. Coudert, Sr., Judge Dillon and Professor Cooley.

Among the representatives from other nations who took active part at the early conferences were Sir Travers Twiss, Passy, Pierantoni, Rolin-Jaquemyns, Bluntschli, Mancini, Sir Robert Phillimore, Winscheidt, Asser and other distinguished publicists.

The headquarters of the parent Association are in London at No. 2 Kings Bench Walk, Temple. The president for 1920 was the Right Hon. Earl of Reading; for 1921, Dr. D. Josephus Jitta, member of the Netherlands Council of State. The chairman of the Executive Council is the Right Hon. Lord Phillimore, who for years served as president. Other presidents have also been well known on this side of the Atlantic, such as the late Lord Alverstone, the late Lord Justice Kennedy and Maitre Edouard Clunet.

The Association has held thirty conferences in the various cities of the world, two of them in the United States, at Buffalo in 1899 and at Portland in 1907. The conferences have dealt with a wide range of international topics not only in the field of public law, but also in the field of maritime and commercial law. The draft statutes and resolutions adopted at the conferences have often received official recognition and have achieved notable success in promoting the progress of international trade relations. The so-called York-Antwerp Uniform Rules of General Average are today incorporated in bills of lading and charter-parties throughout the world. The Rules for Bills of Exchange adopted in 1908 at Budapest have served as a basis for work in the field of world-wide unification. The new Hague Rules of Affreightment were adopted at the recent Hague Conference in September, 1921, and are about to be presented to various legislatures and unofficial bodies for adoption. The Association has also dealt with recognition of foreign companies, comparative law and procedure, the law of aviation, international rules for the sale of goods and many special problems of the conflict of laws. It has paid especial attention to the legal problems of arbitration and judicial settlement and has been active in the codification of certain fields of International Law.

The next conference of the Association is to be held at Buenos Aires in the first week of September, 1922. The Argentine Government has voted a substantial subsidy toward the expenses of the meeting. It is hoped there will be a large attendance from the United States and Canada, emphasizing Pan-American friendship and comity.

Members of the American Branch become *ipso facto* members of the International Law Association without further payment of dues and are entitled to receive all the publications of the parent association. The Association publishes a complete report of the proceedings of its conferences.

The First Meeting of the American Branch has been called for January 27, 1922, in New York City at the house of the Association of the Bar, to be followed by a Banquet at the Hotel Plaza.

The temporary officers of the American Branch are as follows: President, Hollis R. Bailey of Boston; Vice-President, Charles B. Elliott of Minneapolis; Treasurer, Edwin R. Keedy of the University of Pennsylvania; Chairman of the Executive Committee, Charles Noble Gregory of Washington; Honorary Secretary, Arthur K. Kuhn, 120 Broadway, New York.

Book Review

The Constitutional Law of the Philippine Islands. By George A. Malcolm. Volume I, Philippine Legal Series. New York: The Lawyers Co-operative Publishing Company.

This is an important work by an Associate Justice of the Supreme Court of the Philippine Islands who by his earlier work, published in 1916 under the title "The Government of the Philippine Islands," as well as by his briefer textbook "Philippine Civics," has shown his thorough understanding of legal conditions in this Pacific dependency of the United States. The treatise is intended primarily for use in the Islands and is dedicated "To Members of the future Philippine Constitutional Convention with the sincere hope that these modest studies in Constitutional Law will serve to lighten their patriotic labors and to inspire them to produce a Constitution which shall establish and insure a popular Democratic Government." The volume will, however, find a cordial reception by constitutional lawyers as well as by students of government in the continental United States; for not only does it furnish a comprehensive discussion with abundant citations of authorities to the various questions of constitutional law that have arisen with

regard to the status of the Islands, their inhabitants, and their political institutions, but it also presents a study of governmental forms from which the academic student of political science can obtain interesting and valuable information.

The introductory chapters deal briefly with definitions and general principles of constitutional law and with short descriptive accounts of certain constitutional systems of government—of England, Australia, Spain, Mexico, Cuba, and Japan—which the author thinks have peculiar interest to Filipino jurists and statesmen. There is also an account of the Malolos constitution drawn up by the revolutionary congress and promulgated in January, 1899. The text of this interesting document, the only constitution thus far drawn up by the Filipinos themselves, is given as an appendix. This introductory matter having been given, there follows a short constitutional history of the Philippine Islands, disappointingly short, in which Spanish, American, and Filipino influences are respectively discussed. It is not unlikely, however, that the brevity of this account will be corrected in the volume "The Government of the Philippine Islands," which Justice Malcolm, in collaboration with Professor Maximo M. Kalaw of the *Escuela de Derecho* at Manila, promises shortly to publish.

Proceeding to the major part of the task which he has set himself, Justice Malcolm considers the legal relations between the United States and the Philippines, the constitutional and international status of the Islands, the nature, powers, and structure of their government, and the constitutional limitations upon the legal competence of that government. As regards the status of the Filipinos the conclusion is reached that they "are not aliens, or subjects, or citizens of the United States. They are citizens of the Philippine Islands. They are also American 'nationals' owing allegiance to the United States and entitled to its protection." As for the Islands themselves, "the Philippines occupy a relation to the United States different from that of other non-contiguous territory; not a foreign country; not sovereign or quasi-sovereign; not a State or an organized incorporated territory; not a part of the United States in a domestic sense; not under the Constitution, except as it operates on the President and Congress; and not a colony." They constitute a "dependency" of the United States,—a dependency being defined as "a territory distinct from the country in which the supreme power resides, but belonging rightfully to it, and subject to the laws and regulations which the sovereign may think proper to prescribe," and distinguished from a colony by reason of the fact that it is mainly inhabited by people foreign in blood and habits to the population of the sovereign state, and who, it is expected, will not be replaced by immigrants from the dominant state. Justice Malcolm expresses, in the reviewer's opinion, an unnecessary uncertainty whether the Thirteenth and Eighteenth Amendments apply, *ex proprio vigore*, to the Islands, although he is of the personal opinion that they should be held so to apply. As regards the Eighteenth Amendment it will possibly be of interest to some prospective visitors to the Islands to know that as yet Congress has not attempted to enforce its prohibitions in the Philippines by appropriate legislation. In this connection it may be noted that orders of the President and acts and resolutions of Congress have no operation in the Islands unless formally, specifically, and expressly so provided.

Appended to each chapter are lists of "representative authorities" dealing with the subjects discussed; and as appendices are given the texts of President McKinley's Instructions to the Second Philippine Commission (a notable state paper), the Philippine Act of 1902 as amended by later acts, the Philippine Autonomy Act of August 29, 1916 (the so-called Jones Law), and a list of all organic laws of the Islands (U. S. Constitution, treaties relating to the Islands, orders and proclamations of the President, acts and resolutions of Congress, acts of the Philippine Commissions, and the Philippine legislators). (From The Weekly Review, Vol. 4, No. 107, pp. 516-517.) (Issue of May 28, 1921.)

W. W. WILLOUGHBY.

Death of Alexander H. Robbins

Alexander H. Robbins, Editor of the Central Law Journal and one of the most active members of the American Bar Association and of the Conference of Commissioners on Uniform State Laws, died at his home in St. Louis on January 4 at the age of 46.

Mr. Robbins' work as editor made him widely known to the profession and insured him a rare measure of appreciation. In his Journal he was an untiring advocate of the reform of judicial procedure, in which work he was a friend and ally of Mr. Thomas W. Shelton, of Norfolk, Va., chairman of the American Bar Association Committee on Uniform Judicial Procedure. He was deeply devoted to the American Bar Association and the ideals for which it stands and used the opportunities of his position to forward them on every possible occasion.

Appointed in 1917 by Governor Gardner as one of the members of the Conference of Commissioners on Uniform State Laws, he threw himself actively into its work. In 1920 he was chairman of the Committee on Publicity and in 1921 chairman of the Committee on Arbitration of this Conference. In this connection should be noted his activities in the same direction as chairman of the Committee on Uniform State Laws of the Missouri Bar Association. He appeared before the legislature at recent sessions to urge the passage of the Uniform Sales Act.

To his other activities Mr. Robbins added that of author. He wrote a work on "American Advocacy" published in 1904, and one on "Conflict of Laws" published in 1914. For many years he was lecturer on the Law of Real Property and Conflict of Laws at St. Louis University Institute of Law. At the time of his death he was secretary of the Board of Election Commissioners of the City of St. Louis, a position to which he was appointed in 1921 by Governor Hyde.

Mr. Robbins was a native of St. Louis, born on June 21, 1875. He received his early education in the public schools and the Central High School of that city. He completed his law course at Washington University in 1898 and soon thereafter was admitted to practice in the state and federal courts. He is survived by his widow and a daughter, seventeen years of age. He was widely known as a church worker and active supporter of the Anti-Saloon League.

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MISCELLANY

Brief contributions of legal anecdotes, legal curiosities of all kinds, and other matters likely to afford variety and interest to a department of Miscellany are invited from the readers of the Journal.

Chief Justice Fuller as a Poet

The following extract from the speech of Edward P. Mitchell, editor of the New York Herald and Sun, at the Bowdoin Alumni banquet in 1921 casts an interesting light on the early attainments of the late Chief Justice Melville W. Fuller:

"Going back ten years further toward the classic beginnings, there was that still earlier Bowdoin poet, a sophomore in 1851—the only poet, be it proudly said, at this or any other seat of learning or headquarters of culture that ever succeeded in making 'divinely' rhyme with 'Phryne'—who boldly flung in the face of the triumphant and excellent Neal Dow this challenge from this campus:

"'Sweet to the taste, in the desert waste,
Is the draught from the pure cool fountain,
But sweeter than this, with its transient bliss,
To me in the desert roaming,
And brighter still than the sparkling rill
Is the wine in our goblets foaming—

[Observe the insidious false lead toward aqua pura and then the unterrified assertion of the superior quality of the more or less alcoholic beverage.]

"'Then drink tonight, with hearts so light,
To the untried world before us,
And gayly laugh as the wine we quaff,
And join in the merry chorus.'"

"This Bowdoin songster of seventy years agone rhymed 'Phryne' with 'divinely' so well and so merrily laughed and gayly quaffed, at least in the literary sense, that the untried world before him picked him out later to be Chief Justice of the Supreme Court of the United States; and Judge Clarence Hale and the other eminent legal talent here so numerously assembled will confirm me in the statement that no trace of carbonic acid gas ever set a-foaming any of Melville Fuller's masterly opinions from that exalted bench."

Punishment to Fit the Crime.

In the case of *Mylward v. Weldon*, 1 Spence's Equity, 376, which cause was pending in 1596, Lord Chancellor Ellsmere entered a drastic order which the present movement for simplification of procedure makes pertinent. It follows:

"For as much as it now appeared to this court by request made by the lord keeper, being then master of the rolls, upon consideration had of the plaintiff's replication according to an order of the 7th of May of Anno 37 Reginae, that the said replication doth amount to six score sheets of paper, and yet all the matter thereof which is pertinent might have been well contrived in sixteen sheets of paper . . . and for that it now appeared to his Lordship by the confession of Richard Mylward, alias Alexander, the plaintiff's son, that the said Richard himself did both draw, devise and engross the same replication, and because his Lordship is of opinon that such an abuse is not in any sort to be tolerated—proceeding of a malicious purpose to increase the defendant's charge and being fraught with so much important matter not fit for the court, it is thereby ordered that the Warden of the Fleet shall take the said Mylward into his custody, and shall bring him into Westminster Hall on Saturday at ten of the clock in the forenoon, and then and there shall cut a hole in the midst of the said engrossed replication which is delivered unto him for that purpose, and put the same Richard's head through the same hole, and so let the same replication hang about his shoulders with the written side upward, and then the same so hanging shall lead the said Richard bareheaded and barefaced around Westminster Hall whilst the courts are sitting, and shall show him at the bar of every of the three courts within the hall, and then shall take him back again to the Fleet and keep him prisoner until he shall have paid ten pounds to her Majesty for a fine and twenty nobles to the defendant for his costs in respect to the aforesaid abuse, which fine and costs are now adjudged and imposed upon him by this court for the abuse aforesaid."

Twisted Views of Liberty

"How closely Liberty is bound to License when our appetites knit them together! How twin-like smile they at us from the mirror of Desire! They sometimes seem so much alike that it requires *sober* thought to tell one from the other. These warped and twisted views of Liberty will fool none but these gentlemen. We do not see, in them, the patriot salvaging the torch of Liberty. They do not well assume the character of Vestal Virgins to that sacred light. We know that the one thing, beyond all others, which the bootlegger and "bootleggee" dislike is light. No flame is half so modest and retiring as that under the illicit still."—From address on "Respect for Law" before Nebraska Bar Association by Judge Kimbrough Stone, of the United States Circuit Court of Appeals.

Golf and Scotch Volubility

Two Scotchmen who kept a record of all their meetings, had played the whole season through, and they were even at the game of golf; and on the last day of the season they were playing a match to determine the result of their whole year of controversy. And they played the first hole and the second and the third, and so on, up until the eighteenth, and were even at every hole. They came to the eighteenth hole, and were ready to putt for the hole, and were still even. Well, you know a Scotchman is a silent man, given much to taciturnity; and all through this long and gruelling contest neither man had opened his mouth to say a word. Sandy looked at the ball and he looked at the hole and he studied the putt and he putted—and missed. And then for the first time he opened his mouth and he said "Damn." Then his opponent, seeing an easy win and great glory, addressed his ball and putted—and also missed. And he turned with rage upon his opponent and said, "Sandy, you ruined my game with your ceaseless chatter."

Robes for the Bench

"Within a few days the Superior Court judges have donned robes," said Judge Geo. W. Wheeler, of Bridgeport, Conn., at the annual meeting of the State Bar Association at New Haven last year. "That action on their part was taken with the approval of the justices of the Supreme Court. That action was not born of vanity or upon the mere love of the display of power. It was something more than that. The Connecticut Judge as I have known him in a little space of service forgets the personal equation and lives wholly and only for the great cause which he serves. He feels, as Marshall expressed it, 'the judicial department comes home in its effects to every man's fireside. It passes upon his property, his rights, his reputation, his life, his all.' The robe is not essential to the judge any more than it has been said the flag is essential to the nation, but the one helps raise respect for the office of judge and for the law, and the other helps rouse the sentiment of patriotic fervor in the subjects of the nation who look upon the flag. It is not the man upon that bench, it is the officer of the law. It is not even the gifted lawyer upon the bench, it is the officer of justice upon that bench, the man who is called upon to determine between conflicting interests where right and justice are. And the average citizen who comes into that court and looks upon this man upon the bench too often needs something to stimulate his imagination and his understanding so that he shall understand that it is not the man but it is the officer of the great institution of the law who sits there. In this day, when so many who come before us are of the foreign born, or unused to our ways, are perhaps ignorant and perhaps unthinking of these things, it is necessary that there should be something to stimulate and make him understand the meaning, the real meaning, of what the court and that court room is. And then there is something besides that. I want to know whether any man who has worn that robe a little time, as these judges have, can don that garment of justice and not feel a little keener than he ever felt before something of that great service to which his life is committed. He will feel then as Judge Baldwin, I think, once said, 'there is nothing higher or better open to human effort than the administration of justice and right between man and man and between man and the state.'"